

DAVIES

Pre-Merger
Notification Guide:
Canada's
Competition Act

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Canada's Pre-Merger Notification Regime

Canada's *Competition Act* provides that certain types of transactions (Notifiable Transactions) exceeding monetary and other thresholds – referred to as “party-size” and “transaction-size” thresholds – must be notified to the Commissioner of Competition (Commissioner), who is the head of the Competition Bureau (Bureau), prior to closing. In the absence of an exemption or a waiver, parties to Notifiable Transactions must provide the Commissioner with prescribed information and comply with a specified waiting period before completing the transaction.

Parties that have completed a Notifiable Transaction without complying with these provisions may have committed a criminal offence and be liable for significant fines and court-ordered remedies, including dissolution of the transaction.

It is important to note that, irrespective of size, all acquisitions of control or of a significant interest in the business of another entity with a real and substantial connection to Canada may be subject to review and possible challenge by the Commissioner for up to one year after closing if the Commissioner finds that the merger is likely to prevent or lessen competition substantially. Only the Commissioner can challenge a merger under the Act. Applications by the Commissioner are heard by the Competition Tribunal, which is a quasi-judicial body comprising lay and judicial members. Recent years have seen an uptick in the Commissioner's review of non-notifiable mergers; therefore parties to these proposed acquisitions should consult competition law experts early in the process to minimize the risk of unforeseen consequences.

This step-by-step guide is designed to assist with determining whether a proposed transaction is subject to mandatory pre-merger notification in Canada. All amounts are expressed in Canadian dollars and are based on audited financial statements for the most recent fiscal year – for example, asset values refer to book value reported in audited financial statements, not fair market value. (Monetary amounts referenced in this guide are current as of [April 1, 2021](#).)

Determining Whether a Transaction Is Notifiable

Step 1: Assess the Transaction-Size Threshold

The Act contemplates five broad categories of transactions that are subject to pre-merger notification (listed below). Each category requires that the target has an “operating business” in Canada, defined as a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.

If there is an “operating business” in Canada, does the proposed transaction exceed the applicable transaction-size threshold on the basis of the relevant transaction type below?

1. Asset Acquisition

Does either (i) the value of the target’s assets in Canada or (ii) its annual gross revenues from sales in or from Canada generated from those assets exceed \$93 million? Gross revenues “in or from” Canada refers to domestic sales and export sales to a foreign jurisdiction.

2. Share Acquisition

Does either (i) the value of the target’s assets in Canada or (ii) its annual gross revenues from sales in or from Canada generated from those assets exceed \$93 million?

and

Where any of the target’s voting shares are publicly traded,

will the purchaser and its affiliates own more than a 20% voting interest following the acquisition

Where none of the target’s voting shares are publicly traded,

will the purchaser and its affiliates own more than a 35% voting interest following the acquisition

or

if more than a 20% but less than a majority voting interest is already held, will the purchaser and its affiliates own more than a 50% voting interest following the acquisition?

if more than a 35% but less than a majority voting interest is already held, will the purchaser and its affiliates own more than a 50% voting interest following the acquisition?

3. Amalgamation

Does either (i) the value of the continuing corporation's assets in Canada or (ii) its annual gross revenues from sales in or from Canada generated from those assets exceed \$93 million?

and

Do at least two of the amalgamating corporations, together with their affiliates, each have either (i) assets in Canada or (ii) annual gross revenues from sales in, from or into Canada, with a value in excess of \$93 million?

Note that for purposes of the pre-merger notification requirements, a Delaware merger (also known as a triangular merger), including a reverse Delaware merger, is considered to be an amalgamation.

4. Formation of Unincorporated Combination

Does either (i) the value of assets of the combination in Canada or (ii) the annual gross revenues from sales in or from Canada generated from those assets exceed \$93 million?

Note that for purposes of the pre-merger notification requirements, a combination includes a partnership, trust or any other form of non-corporate entity or association.

5. Acquisition of an Interest in an Unincorporated Combination

Does either (i) the value of the unincorporated combination's assets in Canada or (ii) its annual gross revenues from sales in or from Canada generated from those assets exceed \$93 million?

and

Will the purchaser and its affiliates be entitled to more than 35% of either the profits or the assets on dissolution or if more than a 35% but less than a majority interest is already held by them, will they be entitled to more than 50% of either the profits or the assets on dissolution?

If yes, **proceed to Step 2** to assess the party-size threshold.

If the applicable transaction-size threshold is not exceeded, **pre-merger notification is not mandatory**, even if the parties meet the party-size threshold.

Step 2: Assess the Party-Size Threshold

Do the parties to the transaction together with their affiliates collectively have either

(i) assets in Canada

or

(ii) gross revenues from sales in, from or into Canada

in excess of \$400 million?

Gross revenues “in, from or into” Canada refers to domestic sales, export sales to a foreign jurisdiction, and import sales from a foreign jurisdiction.

If the proposed transaction exceeds the party-size threshold, it is notifiable subject to any exemption or waiver that may apply. **Proceed to Step 3.**

If not, pre-merger notification is not mandatory.

Step 3: Evaluate Possible Exemptions

A transaction that satisfies both of the above thresholds may not be subject to pre-merger notification if it falls within a statutory exemption.

Do any of the exemptions below apply in respect of the proposed transaction? This is not an exhaustive list and other exemptions may be available. The Commissioner may also waive the requirement to pre-notify where satisfied that the proposed transaction is not likely to prevent or lessen competition substantially.

1. Transaction Among Affiliates

An acquisition is exempt if all parties to the transaction are affiliates of each other. (For this purpose, the “parties” to a share acquisition are the acquirer of the shares and the corporation whose shares are to be acquired.)

2. Acquisition of Real Property or Goods in the Ordinary Course of Business

An acquisition of real property or goods in the ordinary course of business is exempt if the purchaser would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business. The Bureau considers that certain intangible assets such as loans, mortgages and receivables may be “goods” for the purpose of this exemption. Guidance from the Bureau takes the position that, in some cases, each location of a company’s business may be viewed as a business or an operating segment of a business.

3. Realization on Credit Transaction Entered in the Ordinary Course of Business

An acquisition of collateral or receivables or an acquisition resulting from foreclosure or default or forming part of a debt workout is exempt if made by a creditor in or pursuant to a credit transaction entered into in good faith in the ordinary course of business.

4. Certain Non-Corporate Joint Ventures

A non-corporate joint venture is exempt if it meets the following three-part test:

- i. all the proposed parties to the joint venture are parties to an agreement in writing (or intended to be put in writing) that requires one or more of them to contribute assets and governs a continuing relationship between them;
- ii. no change in control over any party to the joint venture would result from the formation of the joint venture; and
- iii. the joint venture agreement restricts the range of activities that may be carried on by the joint venture and contains provisions that allow for its orderly termination.

The Bureau takes the view that this exemption does not apply to joint ventures in a corporate form.

5. Canadian Resource Property

An acquisition of a “Canadian resource property” (as defined in subsection 66(15) of the Canadian *Income Tax Act*) is exempt if, as a condition of the transfer, the acquirer agrees to incur expenses to carry out exploration or development activities with respect to the property, subject to certain conditions.

A similar exemption applies to an acquisition of equity interests in an entity under an agreement in writing that provides for the creation of those equity interests only if the persons acquiring them incur expenses to carry out exploration of, or development activities regarding, a Canadian resource property, in respect of which the entity has the right to carry out those activities (provided that the entity does not have any significant assets other than that resource property).

If no exemption applies, the proposed transaction is subject to mandatory pre-notification. **Proceed to the following section** for guidance on notification and clearance.

If any of the exemptions above apply, **pre-merger notification is not mandatory.**

Notification and Clearance

If a proposed transaction exceeds the notification thresholds and does not fall within a statutory exemption, parties may either give the requisite notice or obtain from the Commissioner an exemption from or a waiver of the notification obligation that also provides comfort that the Commissioner will not challenge the transaction.

Depending on the extent to which a proposed Notifiable Transaction may raise potential competition issues, parties typically file a request for an Advance Ruling Certificate (ARC) or, alternatively, a no-action letter (NAL), either in lieu of or in addition to filing a formal notification with the Bureau. These types of filings are discussed below.

Further, even if pre-notification is not mandatory, parties sometimes notify the Commissioner voluntarily to obtain greater certainty that the transaction will not be challenged, particularly in cases in which the proposed transaction may result in significant horizontal or vertical competitive overlaps. As noted above, the Commissioner can challenge any transaction for up to one year after closing.

Regardless of the type of filing(s) made with the Bureau, a filing fee, currently \$74,905.57, is payable for each transaction for which the parties request clearance and/or file a notification, regardless of the transaction size.

Apply for an Advance Ruling Certificate or a No-Action Letter

Most commonly, to facilitate the Bureau's review, parties file a submission or "white paper" analyzing the substantive competitive effects of the proposed transaction and requesting an ARC or a NAL, although such a request does not in itself trigger the start of a statutory waiting period. The filing of the submission does, however, trigger the application of the non-binding service standard periods discussed below. Such a submission typically addresses the degree of competitive overlap between the acquirer and the target, their respective market shares, other competitors in the market, potential for expansion or entry by other competitors, countervailing power of customers or suppliers, and other factors relevant to whether the proposed transaction is likely to result in higher prices or otherwise enhance market power in any market in Canada.

An ARC is typically issued only for mergers with no or minimal competitive overlap between the parties. An ARC effectively precludes the Commissioner from challenging the transaction so long as the transaction is completed within one year. A NAL states that the Commissioner does not currently intend to make an application challenging the transaction (but reserves the right to do so for up to one year after closing). A NAL can also include a waiver of the notification requirement. Parties routinely close transactions in reliance on a NAL.

File a Notification Form

Parties may also file prescribed information to start the statutory waiting periods discussed below. Each party is required to certify that the information it has supplied is correct and complete in all material respects. A template [notification form](#) is available on the Bureau's website.

Parties may elect not to provide certain information – for example, in cases where it is privileged, not reasonably obtainable, not known or not relevant to the Commissioner's review of the proposed transaction; however, the Commissioner can, on the basis of relevance, require the submission of information initially withheld.

The Merger Intelligence and Notification Unit of the Bureau is responsible for handling all merger notifications.

Timelines for Notification and Clearance

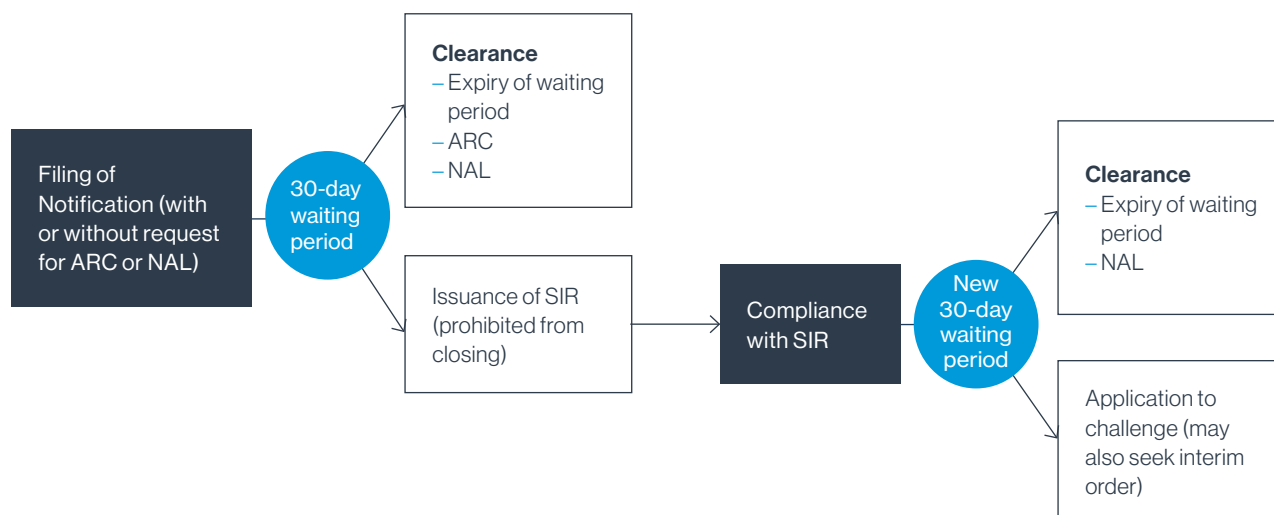
Statutory Waiting Periods for Notifiable Transactions

The initial statutory waiting or no-close period is 30 days from receipt of a complete notification from each party to the transaction (except in the case of a share acquisition, in which the waiting period commences upon receipt of a complete notification from the purchaser). In circumstances in which the Bureau requires additional information to complete its review, the Commissioner may issue a supplementary information request (SIR) prior to expiry of the initial 30-day waiting period, in which case the transaction cannot be completed until 30 days after each party certifies compliance with the SIR. After the second 30-day period has elapsed, the parties may complete the transaction unless the Commissioner obtains an injunction from the Competition Tribunal.

When the Commissioner exercises his or her discretion to issue an SIR, the Bureau will generally provide a draft SIR and engage in limited pre-issuance dialogue with each recipient party. SIRs can require extensive document (including electronic records) and data production, and a complete response can take many weeks.

In some cases, the Bureau will continue its investigation beyond the expiration of the initial waiting period without issuing an SIR but enter into a “timing agreement” with the parties to address key milestones, such as commitments regarding the earliest closing of the proposed transaction and possible further production requirements. Such timing agreements may also be entered into following expiry of the waiting period 30 days after compliance with an SIR.

NOTIFICATION AND CLEARANCE TIMELINES



Note that the Commissioner can issue a NAL or waiver exempting the parties from further compliance with the waiting periods at any time during the process, effectively providing clearance for the proposed transaction.

Unsolicited Takeover Bids

Where only a bidding party (and not the target company) files a notification, the Commissioner is required to notify the target company immediately, and the target is then required to file its portion of the notification within 10 days. The timing of the target's filing of either an initial notification or responses to an SIR does not affect the running of either the initial waiting period or the waiting period following the bidding party's response to an SIR.

Service Standards for ARCs and NALs

The Bureau has established a non-binding classification system for proposed mergers and associated "service standard" timelines within which it aims to complete its competitive assessment of the merger. (These service standards are distinct from and do not affect the above-noted statutory waiting periods.)

These service standard periods are (i) 14 days for non-complex mergers (transactions that clearly have no competition issues because there is minimal or no competitive overlap between the merging parties) and (ii) 45 days for complex mergers (transactions between competitors, or a customer and supplier, where there are indications that the transaction may create, maintain or enhance market power). The service standard periods start to run once the Bureau determines that it has all the information necessary from the parties to commence its analysis. The periods can be suspended and restarted if the Bureau considers that a party is not responding to further Bureau questions in a timely manner.

The service standard periods are not binding, and actual timing of the Bureau's review of a proposed transaction can also be influenced by many factors, including other mandatory regulatory review processes (e.g., reviews under the *Investment Canada Act* for certain investments in Canada by non-Canadians; see [Davies' ICA Guide](#) for more details) or reviews of the same transaction in foreign jurisdictions.

Merger Enforcement Trends

The economic landscape created by COVID-19 will set the stage for mergers in 2021 and will, in turn, influence merger enforcement. Perhaps unsurprisingly, the pandemic had a material impact on the number of merger transactions reviewed by the Bureau in 2020. According to Bureau statistics, a robust 13% year-over-year increase in merger reviews in the first quarter of 2020 was followed by year-over-year declines of 55% and 40% in the second and third quarters, respectively. The situation does not seem to have improved in the fourth quarter of 2020 either, as merger reviews in October and November declined by 33% compared with the previous year. Accordingly, a key development to watch for in 2021 is whether this trend will be reversed as the economy recovers from the impact of the pandemic.

These current conditions have also raised the question of whether the Bureau will give greater consideration to “failing firm” arguments in its merger assessments. The Act expressly provides that in assessing a merger, the Bureau will consider “whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail.” If this threshold is met, the loss of actual or future competition from the failing firm is not attributed to the proposed merger. The Bureau has interpreted this failing firm defence quite strictly in practice, taking the view that the purchasing party must demonstrate that the target is likely to exit the market absent the acquisition, whether owing to insolvency, bankruptcy or receivership. This is a high standard to meet, and the failing firm defence has been successfully invoked in only relatively few transactions. One recent example is the Bureau’s clearance in April 2020 of the merger of Total Metal Recovery Inc. (TMR) and American Iron & Metal Company Inc. (AIM), the two largest scrap metal processors in the province of Québec. In that case,

the Bureau concluded that TMR was a failing firm and that its assets were likely to exit the market in the absence of the merger.

Given the significant economic impact of COVID-19 restrictions and the interest in preventing Canadian jobs from permanently disappearing, some market observers have called for the expansion of the scope of the failing firm defence for target firms adversely affected by the pandemic. Although the Bureau did not make express reference to the pandemic when it announced its clearance of the TMR/AIM transaction, some observers pointed to this example as a hopeful sign of a relaxation in the Bureau’s position. However, in September 2020, the Deputy Commissioner in charge of the Bureau’s Mergers branch wrote in an article that the Bureau did not intend to relax its standards to accommodate the acquisition of firms weakened by the pandemic. Accordingly, even though we expect that the failing firm defence will be raised more frequently in the year ahead, merging parties thinking of relying on this argument should not expect an easier path forward simply due to COVID-19.

A continuing trend is the Bureau’s scrutiny of minority interest holders in merging parties, which sometimes results in detailed information requests from merging parties. However, it remains to be seen whether the Bureau would seek to block a transaction solely on the basis of non-controlling minority interests held by an investor in competing firms – particularly since enforcement action seeking to limit common shareholdings in competing firms could have a chilling effect on overall investment, be unworkable in practice and raise other legal and policy issues. For now, the Bureau’s requests for details on minority interests can cause delays in merger reviews and may raise disclosure issues or involve information unavailable to the purchaser.

SELECTED RESOURCES

1. ***Competition Act (Canada), RSC 1985, c C-34***

The Act is a federal statute governing the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition in Canada. Sections 91–99 address the substantive review of mergers. Sections 108–124 set out the requirements for pre-merger notification.

2. ***Notifiable Transactions Regulations, SOR/87-348***

These regulations are made under the Act and, among other things, set out procedures for calculating the aggregate value of assets and gross revenues from sales for purposes of the party-size and transaction-size thresholds for the pre-merger notification provisions in the Act.

3. ***Pre-Merger Notification Interpretation Guidelines (various)***

The Commissioner issued these interpretation guidelines to assist parties with interpreting and applying certain provisions of the Act and regulations relating to notifiable transactions, including with respect to defined terms, exemptions and transaction structures.

4. ***Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act (November 1, 2010)***

This guide provides an overview of provisions of the Act and regulations and explains Bureau procedures relating to notifiable transactions and advance ruling certificates.

5. ***Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters (May 1, 2018)***

This handbook provides information related to the Bureau's fees, complexity designations, service standard periods and procedures for mergers and merger-related matters.

6. ***Merger Review Process Guidelines (September 8, 2015)***

These guidelines describe the Bureau's general approach to administering the Act's two-stage merger review process, including determining whether to issue an SIR, working with merging parties to narrow issues and/or SIR requirements for records, including data, and considering whether a timing agreement is appropriate.

7. ***Merger Enforcement Guidelines (October 6, 2011)***

These guidelines provide general direction on the Bureau's analytical approach to assessing whether a merger is likely to prevent or lessen competition substantially, including the Bureau's approach to market definition, the significance of market shares and the assessment of different types of potential anticompetitive effects.

8. ***Information Bulletin on Merger Remedies in Canada (September 22, 2006)***

This bulletin sets out the Bureau's policy on merger remedies, including providing guidance on the objectives for remedial action and the general principles applied by the Bureau when it seeks, designs and implements remedies.

Definitions

Audited Financial Statements

When audited financials for the most recently completed fiscal year are not available, calculations are based on amounts stated in the relevant entity's books, in accordance with accounting principles that are generally accepted for the type of business carried on by that person. (A specific accounting standard – e.g., GAAP, IFRS – is not mandated.)

Affiliate

“Affiliate” has the following meaning for the purposes of the Act:

- One entity is affiliated with another entity if (i) one of them is a subsidiary of the other, (ii) both are subsidiaries of the same entity or (iii) each of them is controlled by the same entity or individual.
- If two entities are affiliated with the same entity at the same time, they are deemed to be affiliates of each other.
- An individual is affiliated with an entity if the individual controls the entity.
- An entity is a subsidiary of another entity if it is controlled by that other entity.
- A corporation is controlled by an entity or an individual if securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, other than by way of security only, by or for the benefit of that entity or individual, and the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation.

- An entity other than a corporation is controlled by an entity or individual if the entity or individual, directly or indirectly, whether through one or more subsidiaries or otherwise, holds an interest in the non-corporate entity that entitles the holder(s) to receive more than 50% of the profits of that entity or more than 50% of its assets on dissolution.

Assets in Canada

The *Notifiable Transactions Regulations* set out the procedure for calculating the aggregate value of assets and gross revenues from sales for purposes of the party- and transaction-size thresholds.

The asset assessment for both the party- and transaction-size thresholds is based on assets located in Canada. Adjustments may be required depending on the particular circumstances. For example, parties may deduct

- in certain circumstances, amounts that represent duplication arising from transactions between affiliates;
- any amount that represents duplication arising from an ownership interest (including minority interests) of one person in another person; and
- any amount provided for depreciation or diminution of value (as reflected in the financial statements for the most recently completed fiscal year).

Subsequent transactions or events may also affect relevant asset values – for example:

- writedowns or re-evaluations for financial reporting purposes of the value of any assets;
- dispositions, acquisitions or reorganizations that are likely to have a material effect on the aggregate value of assets; and
- agreements or other events that are likely to have a material effect on the aggregate value of assets.

Other Exemptions

Some of the provisions setting out additional exemptions are highly technical, and parties should review their circumstances with competition law counsel. Other exemptions include the following:

(a) Acquisitions of Voting Shares or Interests in Combinations Solely for the Purpose of Underwriting the Shares or Interests

Underwriting of a security refers to the primary or secondary distribution of the security, in respect of which a prospectus is required to be filed, accepted or approved under a Canadian or foreign securities law regime, or would be required to be filed, accepted or approved but for an express exemption under a Canadian or foreign securities law regime.

(b) Gifts, Intestate Successions or Testamentary Dispositions

Gifts, intestate successions and testamentary dispositions are exempt from notification.

(c) Transactions Exempted by the Canadian Minister of Finance

A merger under the federal *Bank Act*, *Cooperative Credit Associations Act*, *Insurance Companies Act* or *Trust and Loan Companies Act* is exempt from merger notification and review if the Canadian Minister of Finance has certified to the Commissioner that the merger is in the public interest.

(d) Asset Securitization Transactions

The *Notifiable Transactions Regulations* exempt certain types of transactions involving transfers of financial assets that are entered into for the purpose of obtaining funds or credit or for related financial purposes whereby the financial assets continue to be administered either by the transferor or by an agent, trustee or other person who meets specified criteria.

Notification Form

The form to be completed by each party to the transaction requires specific statutorily prescribed information about the transaction (e.g., structure and consideration); the business of each of the parties and their respective affiliates; detailed customer and supplier information; and all studies, surveys, analyses and reports that were prepared or received by an officer or director of the party for the purpose of evaluating or analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions.

Key Contacts

If you would like to discuss any of the issues raised in this publication or would like to receive more information, please contact any of the individuals listed below or visit our website at www.dwpv.com.



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About Davies

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With offices in Toronto, Montréal and New York, the firm's capabilities extend across borders. Our lawyers are internationally recognized for their technical rigour and ability to create solutions for our clients that simply work. Considered a top-tier firm in each of our core practice areas, we represent a wide range of organizations across industries in North America and abroad. Contact any of our lawyers to discuss your situation or visit us at www.dwpv.com.

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