GETTING THE DEAL THROUGH

# Mergers & Acquisitions

## in 61 jurisdictions worldwide

**Contributing editor: Casey Cogut**

# 2010

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# Greece

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### 1 Types of transaction
How may businesses combine?

Possible forms of business combinations, classified according to the legal structure used, are as follows.
- Absorption merger: where the assets and liabilities of one company are fully absorbed by another. The 'absorbed' company ceases to exist as a legal entity and the company performing the buyout takes over its assets and liabilities.
- Consolidation: the combination of two separate companies into a new company with separate legal existence. In this case both companies cease to exist.
- Merger buyouts: realised by either a share deal, where the buying company buys out shares of the target company, or by an asset deal, where the buyer purchases the target company itself and all of its assets.
- Merger buyouts: by formatting an intermediate company which finally proceed into a merger together with the buyer and target company after the end of the buyout procedure.
- Share acquisitions: the company invests in the shares of the bought company (corporate coordination).
- Public buyout offer: where the buying company addresses a public invitation to buy a part (usually a majority) of the common shares of the target company at a fixed price and in termination date. The above procedure usually leads to gaining management control of the bought company and is subject to special capital market legal provisions.

### 2 Statutes and regulations
What are the main laws and regulations governing business combinations?

Business combinations realised via methods not including a capital market exchange are regulated by Law No. 2190/20 on SA companies (articles 68 to 80, as amended by Presidential Decree No. 498/1987, in harmonisation with EU regulatory directives on corporate law), which provides for two basic types of mergers between two or more SA companies (merger buyouts and mergers by forming a new company), and Law No. 3190/1955 for limited liability companies (EPEs) providing for mergers only between two or more limited liability companies under the above-mentioned types of merger.

Mergers and acquisitions realised through public buyout offers in the capital market are specifically regulated by Law No. 3461/2006 (in harmonisation with EU Directive 2004/25/EC), providing for the procedure followed in takeover bids and the potential countervailing measures of the directors of the target company, and the regulatory decisions of the Hellenic Capital Market Committee (eg, Decision No. 4/403/2006 regarding squeeze-out rights).

In both cases the following are also applicable: the tax regulatory framework as set out by Presidential Decree No. 1297/72, Law No. 2166/93 and Law No. 2578/98 (in harmonisation with EU Directive 90/434/EC), providing for tax relief and incentives regarding various business combinations, and Antitrust Law No. 703/1977, providing for restrictions on combinations having serious economic effects on the relevant market.

### 3 Governing law
What law typically governs the transaction agreements?

Unless the merger involves cross-border transactions, most issues would be governed by Greek law. However, there are issues that, in theory, can be referred by the parties to arbitration in which a foreign law is applicable, but this is seldom the case.

### 4 Filings and fees
Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Mergers regulated by Law No. 2190/20 require the submission of merger plans and of the final merger agreement for each of the merging companies before the commercial registrar of the Prefecture in which each company has its registered seat. Both the merger plan and the agreement are forwarded by the Prefecture for publication in the Government Gazette and at least one daily financial newspaper, a procedure that entails certain costs and fees. For the completion of the procedure, for mergers and acquisitions that lead to a formation of a new company or to the capital increase of the merging or buyer company, an additional compensatory charge has to be paid to the Hellenic Antitrust Committee equal to 0.1 per cent on the initial or increased capital (according to article 1 of Law No. 2837/2000) together with a capital accumulation tax of 1 per cent calculated on the above-mentioned capital. Other transfer taxes, stamp duties or third-party taxes do not apply to the vast majority of mergers, which are usually subject to the tax incentive Laws Nos. 1297/72 and 2166/93.

Especially for public buyout offers through the stock market, the potential buyer must submit before the Hellenic Capital Market Committee an Aanouncement of the public offer and a prospectus according to article 11 of Law No. 3461/2006, which is usually drafted by a Greek credit institution and subject to the relevant fees.

### 5 Information to be disclosed
What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Yes. According to article 79, Law No. 2190/20, absorption mergers and consolidations, as well as share deal mergers accomplished outside the framework of the stock market, must publish a merger plan including the information required by article 69 of the aforementioned Law No. 2190/20:

- the details of the participating companies (name, registered seat, etc);
- the exchange ratio for the shares to be given to the shareholders of the absorbed, new or bought company;
- the formal procedure for delivering the new shares and the date on which the shares acquire a participation right;
- the rights that are ensured by the absorbing or buying company towards special status shareholders or holders of titles other than shares; and
- all special privileges that will be attributed potentially to members of the board of directors and auditors, for all participating companies.

In the case of public buyout offerings, the buyer gives out to the investing public an informational prospectus, including the information required by article 11, Law No. 3461/2006, namely information regarding the following:
- the identity of the buyer company;
- the consultant company of the buyer;
- details on the persons responsible for drafting the prospectus;
- information regarding the financing;
- the shares that are the object of the takeover proposal;
- the maximum number of shares that the buyer commits to or is obliged to acquire and the number of shares that the buyer already owns in the target company;
- the offer price and the method by which it has been assessed;
- the date of initiation and termination of the approval period;
- the formalities to be followed by the shareholders of the target company in the case of approval from their part of the public offer;
- the business plan of the buyer;
- any external shareholders' agreements between the buyer and the target company or within the shareholders of the target company that might have affect on the public offer;
- any clauses or conditions that the public offer applies to the target company's shareholders (to the extent allowed by the capital markets legislation);
- the share acquisitions from the buyer company relating to the shares of the target company realised during the past 12 months from the application of the public offer; and
- a detailed report of the share capital composition of the buyer.

### 6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In mergers and acquisitions relating to private companies there is no such obligation. A requirement for such disclosure applies to public companies. According to article 9 of Law No. 3556/2007 and decision 1/434/2007 of the SEC, any transaction by which a shareholder buys or sells shares leading to modification of his or her share ownership above or below the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 50 per cent or two-thirds must be announced to the company, which then subsequently discloses such modifications to the investing public.

### 7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

According to Greek law, as is also the case in many other jurisdictions, members of the board of directors of an SA company have a duty of care and a duty of loyalty directly towards the company and indirectly to its shareholders for the loss value of their shares. This duty equally applies to all responsibilities and tasks that a director has towards the company and its shareholders during the process of a merger or acquisition. More particularly, according to article 22a of Law No. 2190/1920, paragraphs 3a and 3b, it is prohibited that directors have competing interests with the interests of the company and if they do, there is a duty of disclosure accordingly. Furthermore, a recent modification of article 22a of Law No. 2190/1920 on SA companies introduced the principle of 'business judgement rule'. According to that principle, inspired by the similar provisions of US law on the same matter, directors have a wide competence to decide on business and management matters of the company provided that they have been adequately informed about the subject matter of the issue to be decided, and have acted in good faith towards the interests of the company. Special provisions in relation to majority shareholders are not provided; however, it is commonly accepted by Greek courts that there is also a duty of care for majority shareholders towards the company. In particular, directors, managers and majority shareholders in listed companies, apart from the above-mentioned duties, have also an obligation to refrain from market abuse or market manipulation by spreading privileged information. Such restrictions will apply also where there is a rumour or concrete intention to make a public buyout offer and will apply to directors and majority shareholders of both the target and purchasing company.

### 8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In mergers and acquisitions of SA companies, minority protection is achieved in the following ways:
- by the requirement for a supermajority at any general meeting that makes any alterations to the articles of incorporation and the approval of the merger agreement (articles 29 paragraph 3 and 31 paragraph 2 of Law No. 2190/1920);
- by the requirement for an increased quorum also for shareholders that hold shares with special rights (articles 69 and 82 of Law No. 2190/1920);
- by the requirement for the board of directors to submit a report to the general meeting of the shareholders explaining the legal, economic and other important implications of the merger, in which must be contained inter alia the justification for the share exchange ratio (articles 69 paragraph 4 and 82 paragraph 5 of Law No. 2190/1920); and
- by the requirement that the financial statements of the past three years and other relevant data are submitted to the shareholders one month prior to the general meeting that is scheduled to make a resolution on the approval of the merger contract (articles 73 and 84 of Law No. 2190/1920).

### 9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile buyouts are those, usually as a result of a public buyout offer, where the board of directors of the target company does not agree with the potential buyout of the company. Under the Greek capital markets legislation, special considerations referring to the position of the board of directors of the target company are applicable by virtue of article 14 of Law No. 3461/2006. This law introduced the principle of behavioural neutrality of the board of directors, according to which the board of directors cannot proceed to any act, except for acts relating to the usual management of the company, that could result in the cancellation of the buyer's buyout offer. Time limits for the above behavioural restrictions are also introduced, so that the board of directors is committed to the above principle from the date of its update on the buyout offer until the publication of the results (success or frustration) regarding the buyout offer. Exemptions to this general principle are allowed only when defence methods as applied by the directors of the target company are used in accordance with a relevant decision of the shareholders' meeting, or in the specific case where the board of directors seeks alternative and potentially more profitable deals from third-party buyout offers.

### 10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In the light of the principle of behavioural neutrality towards public buyout offers (see question 9), the protection or frustration of the (initial) public buyout offer is not in the competency of the board of directors of the target company. This is why potential agreements between the target and the acquiring company providing for a breakup fee for the acceptance of a third-party offer and consequently the frustration of the initial buyout offer, are not acceptable under the Greek capital market law. In any case, when a buyout offer is submitted from a third party, the initial buyer has the right to withdraw his offer by relevant announcements published on the stock exchange website and the website of the buyer, but only if such announcement takes place during the first three days after approval of the prospectus by the Stock Exchange Commission.

### 11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

No. The legality of mergers and acquisitions under Greek law is monitored by the administration, which is represented by the local prefecture. Locality depends on the registered seat of the participating companies. It may be said that the range of the prefecture's control is relatively restricted to the following issues:

- the formalities observed in relation to the general meetings of the shareholders;
- the merger plan that contains the terms of the merger agreement;
- the existence of a following merger agreement;
- the audit report estimating the value of the merging companies; and
- whether there have been any objections filed on the part of the participating companies' creditors.

In public buyout offers, the Stock Exchange Commission has also the competency to assess whether the content of the prospectus, as filed by the buyer, is compatible with the legal provisions of Law No. 3461/2006 on the informational requirements and protection of the investing public.

### 12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In Greek law, restrictions referring to the imposition of conditions upon the buyout offer on the part of the buyer are found only in relation to public offerings of listed companies. That matter is regulated by article 22 of Law No. 3461/2006, which stipulates that a public buyout offer for the acquisition of shares must generally be made without any reservations or conditions. An exception to that is the possibility for the buyer to make the public offer conditonal on the issuance of any administrative licensing requirements (eg, licence for the offering from the Stock Exchange Commission). In contributions of cash, the financing method used by the buyer can also be subject to terms and conditions but these terms must be published together with the other informational elements that the law requires to be included in the prospectus.

### 13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents?

The external financing over a takeover through loans given by a financial institution (other forms of external financing are financing through the stock market or through venture capital) is greatly limited within Greek corporate law, especially by the regulations set in articles 23a and 44a of Law No. 2190/20. A distinction should be made as to whether the loan is given directly to the buyer, as is usually the case in an asset deal merger, or to the target company, usually in the case of a share deal merger or public buyout offers, in which the target company is the one undertaking financing support of the deal by giving to the buyer financing in the form of a second loan. The latter case is of dubious legality under the Greek corporate law according to article 23a of Law No. 2190/20. In any case, the relevant claim of the entity providing the loan (bank or target company) may be incorporated in a separate private document or in the form of a marketable security with a bank letter of promise note. In the case of an asset deal merger the loan may be insured with asset securities upon the transferable assets (stocks or assets comprising the company to be transferred), while in the relevant case of share acquisitions or public offers the target company cannot contribute by giving securities in favour of the buyer, since this practice is not compliant with the corporate law rules (23a and 44a Law No. 2190/20), and therefore such practices are not usual in Greece.

### 14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Yes. More specifically, there are special provisions both for SA companies with shares listed in the stock market according to articles 27 and 27A of Law No. 3461/2006 (for harmonisation with Directive 2004/25/EC) as well as, for unlisted SA companies, according to article 49c of Law No. 2190/20, as amended, which came in force by the recent revision of the whole body of corporate law, through Law No. 3604/2007.

In the framework of a public buyout offer for listed companies, if the buyer, following a public offer addressed to all shareholders and concerning the total amount of moveables of the target company, acquires over 90 per cent of the total voting rights of the target company, he or she may demand the transfer into his or her name of all remaining company shares owned by minority shareholders. The procedure is the following:

- summary of the relevant term in the prospectus (via which the intention as well as eventual buyout terms are made public);
- application to the Stock Exchange Commission, communicated to the target company, stating the buyer's intention to exercise the squeeze-out right. The application must necessarily include the price offered to the minority shareholders and a certificate by a Greek or foreign banking institution, stating that the buyer is in a position to pay the total amount of the price offered;
- resolution by the Stock Exchange Commission, determining the total acquisition price and the payment method to be followed. The price shall be paid to the minority shareholders with no further delay; and
- registration of the buyer as new owner of the shares that are subject to the squeeze-out right, as soon as the full price is paid.

The deadline for exercising the squeeze-out right is three months from the expiration of the turnover acceptance period.

The squeeze-out right for SA companies with no listed stocks is similar: if a shareholder has acquired, in any way, after the company's initiation, over 95 per cent of the total corporate capital, he or she may buy out the remaining 5 per cent from the minority shareholders for a 'fair price'. The procedure is the following:

- application by the majority shareholder before the multi-member first instance court of the district where the company has its registered seat;
- expert audit report, determining the value of the stocks to be acquired, following a company evaluation;
- court resolution for the final price determination of the shares to be acquired; and
- deposit of the total price to a banking institution and public declaration, including the buyer's details, company details, court resolutions acknowledging the takeover and determining the price, and the details of the banking institution where the deposit was made. The declaration is published in the Government Gazette and in the daily and financial press. Upon this final publication the stocks of the minority stockholders devolve *ispo jure* to the majority stockholder.

The deadline for exercising this right is years from the day the majority shareholder acquires 95 per cent of the corporate capital.

### 15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A special legal framework allowing and regulating cross-border mergers exists only in relation to European cross-border mergers of capital companies. The relevant Greek law is the recent Law No. 3777/2009, in harmonisation with the European Directive 2005/56/EC, and follows the structure and procedure provided for by the aforementioned directive. Consequently, and under the provision that the merger is allowed by the national law of all merging companies, cross-border transactions are structured as follows, as far as the Greek part of the procedure is concerned:

- drafting of a common merger plan by the administration of each merging company;
- report by the administration of each merging company and a report by independent experts regarding the financial results of each company;
- application of all publication formalities for the merger plan;
- approval of the common merger plan by the general meeting of each company;
- legal conformity control of the merger by the competent authority of each member state – for Greece it is the General Direction for Commerce of the Ministry for Development;
- drafting of a merger agreement by a notary public; and
- completion of the publication formalities by registering the approving decision issued by the Ministry for Development in the General Register (GEMI) of the Direction for Commerce, the Ministry for Development and the Government Gazette.

Similar administrative resolutions are issued and entered in the registers of the member states under whose jurisdiction the company or companies participating in the merger belong.

### 16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are three basic issues that are time-sensitive in relation to a merger procedure.

**The publication requirements of the merger agreement**

Two months prior to the general meetings of the shareholders of the merging companies involved, in which the merger shall be resolved, a summary of the merger agreement must be publicised in the Government Gazette as per article 7b of Law No. 2190/1920. Within 10 days after the conclusion of the above-mentioned publication, the boards of directors of the two companies must publicise a summary of the merger agreement in a recognised financial newspaper (articles 69 and 70 of Law No. 21980/1920).

**The request of warranties by creditors of the merging companies and the submission of objection to the warranty plan**

Article 70 of Law No. 2190/1920 gives the right to creditors to request warranties within one month after the conclusion of the publication mentioned above. Quite interestingly, according to the wording of the relevant paragraph 2 of article 70 of Law No. 2190/1920, the one-month period applies in relation to the objections of the creditors to the warranty plan presented by the companies undergoing merger, without any intermediate deadline that has to be observed by the companies in producing the plan. This essentially means that if the company delays the presentation of a warranty plan, this delay is to the detriment of the creditors.

**The information submitted to shareholders**

One month prior to the general meetings of the companies to be merged, any shareholder may obtain from the company's seat of business at least the following items:

- the merger contract terms;
- the financial statements of the merging companies for the last three years prior to the financial years and the relative administrative reports of the boards of directors;
- an interim balance sheet if the balance sheet is more than six months old;
- the report of the board of directors to the general meetings of the merging companies that explains the terms and the justification of the share exchange terms; and
- the evaluation report issued by the Committee of the Ministry of Development (this committee is provided by article 9 of Law No. 2190/1920 whose task is to evaluate all contributions in kind made to SA companies. In mergers, its role is to evaluate the merging companies, for the protection of third-party creditors).

### 17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

A special merger status is provided for banking SA companies and for insurance companies.

**Banks**

In general, the same regulations apply as for the merger of SA companies, as provided by articles 68 to 80 of Law No. 2190/1920, with some differences. The main difference is the one established by paragraphs 13 and 14, article 16 Law No. 2517/1998, namely, that any administrative licences and in general all public law relationships of all institutions to be merged are transferred *ipso jure* to the new entity.

**Insurance companies**

The transformations and mergers of insurance companies (which in the Greek jurisdiction may have the form of SA companies or mutual insurance partnerships) are subject to control and approval by the Department for Insurance Companies and Actuary of the Ministry for Development, according to article 1, paragraph 3, Legislative Decree 400/70, which issues the Ministerial Decree announcing the final approval of the merger, following the said approval. The procedure is regulated by articles 68 to 80 of Law No. 2190/20, but there is an additional requirement for the submission to the regulating authority of an activity plan for the new company, which controls the credibility and the financial sustainability of the new

### Update and trends

According to recent business reports referring to the Greek market, in the current economic crisis the total number of companies participating in any form of merger totalled 345 during 2009, while the corresponding number for 2007 was 450. This report data can be easily attributed to the typical effects that an economic crisis may have on a national economy, resulting in restrictions on corporate finance, the increase of interest rates and general economic instability. In addition to the above, from May 2010 due to its fiscal deficiency Greece is also under the scrutiny of the International Monetary Fund (IMF). It is known that IMF can affect the rate of economic growth and business competiveness via various channels. The fiscal surveillance programme of the IMF over the Greek economy has already lead to major reforms in tax and labour law so that the Greek economy can meet loan requirements and at the same time be attractive to foreign investors. The first measures according to the restructuring of fiscal debt programmes have already been adopted by Law Nos. 3833/2010 and 3845/2010, providing mostly for restrictions on labour law rights. Although the outcome of the IMF policies has not been demonstrated yet in the real economy of Greece, in reference to other national economies under relatively similar conditions we may estimate that macro-economically the growth rate and consequently business combinations will eventually increase. On a short-term basis, besides the effects that IMF measures tend to have on national economies, from an optimistic perspective we also estimate that business transactions and foreign investments will be the case in the forthcoming years, mostly due to incentives deriving from legislation and other functional changes resulting in operational cost savings in favour of all types of investment buyouts and corporate reforming.

company. Furthermore, a three-month period is provided for during which insuring parties may register any objections they might have (article 59, LD 400/70, applied by analogy). Finally, a significant limitation for insurance company mergers has been set with article 3A paragraph 1, LD 400/70, which provides that insurance companies, established following Presidential Decree 118/98, may be active either in the damages insurance sector or the life insurance sector and consequently no mergers are allowed between insurance companies belonging to different sectors.

### 18 Tax issues

What are the basic tax issues involved in business combinations?

The basic tax issues regarding mergers and acquisitions can be described in brief as being the following: tax assessment of the going concern value (capital gains) of the transferred shares, mainly in share deal mergers and public buyout offerings; tax calculation of hidden reserves, mainly in absorption mergers where the company performing the absorption continues to exist after the merger; and the possibility of maintaining the granted tax benefits of the merging companies in favour of the newly formed one.

The Greek tax regulation framework, however, after the adoption of the incentive laws Presidential Decree 1297/72, Law No. 2166/93 and Law No. 2578/98 provides for extended tax exemptions applied to the majority of mergers and acquisitions, so that business combinations become a less expensive and a more efficient tool of economic growth within the Greek market. In brief, important provisions set by the above framework refer to:

- tax exemptions from the going concern value (capital gains) on the transferred shares;
- exemptions from the tax imposed on real estate upon transfer; and
- general exemptions from any fees, stamp duties, imposed taxes or other rights in favour of third parties, or any additional tax upon reserved capital that has already been exempted.

The issue of maintaining or not the granted tax benefits of the participating companies has been regulated by article 2 (paragraphs 3, 4) Law No. 2166/93 and article 10 (paragraphs 1, 2) Presidential Decree 1297/72 in favour of the solution of maintenance in favour of the merged company. It is important to note that both Law No. 1297/1972 and 2166/1993 are not applicable to all mergers but only under specific conditions, which have to do with the size of the company after the merger, a minimum number of years of previous operation, etc.

### 19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework is Presidential Decree 178/2002 through which Greece has adopted Directive 77/187/EEC, which applies directly to every corporate merger buyout and transfer of corporate department or establishment. The general principle of the above regulation is that the labour relationship is preserved in its entirety together with all the provided obligations and rights in favour of the employee in the transformed corporate entity, although the new employer does reserve the right to make dismissals for economic or technical reasons in accordance with the management policies of the new entity under the terms of the Greek legislation protecting the rights of employees in the event of dismissal (as provided by, inter alia, article 6(1) of Law No. 2112/1920, article 9(1) of Royal Decree dated 16/18 July 1920, and article 8 of the Presidential Decree of 8 December 1928).


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**20 Restructuring, bankruptcy or receivership**

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A distinction is made depending on whether the target company is in a situation of impending financial insolvency or has already definitely suspended payments. The aforementioned distinction was for the first time introduced into Greek law by Law No. 3588/2007 (the new Bankruptcy Code), which integrated into a systematic unit all restructuring and reorganisation procedures, as well as all corporate bankruptcy procedures. In the first case, the company may ask to be included in the new reconciliation procedure provided by article 99 of the Bankruptcy Code, in the framework of which the company to be restructured may proceed to make any change via a merger or takeover, provided it is consistent with the reorganisation objective of resolving its financial problems. In the second case, such as when the target company is declared bankrupt, the company is dissolved and the bankrupt procedure is orientated towards the liquidation of its assets. Only after the completion of a bankruptcy settlement with the creditors and an eventual resolution from the shareholders' meeting in favour of the revival of the bankrupt company may any such company combination may take place on the grounds that the liquidation process has not started yet (according to article 47(5) Law No. 2190/20).

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