

WHAT IS THE INFORMATION NEEDED FOR THE COMMISSION TO CONDUCT ITS SUBSTANTIVE ASSESSMENT UNDER THE NEW EU FOREIGN SUBSIDIES REGULATION?



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The new EU Foreign Subsidies Regulation ("FSR") adopted at the end of 2022 is not yet applicable but it has already been subject to extensive criticism due to its draft implementing regulation, especially in the context of large concentrations for which clearance must be obtained from the Commission where certain thresholds are exceeded. This paper takes a closer look at the distortion of the internal market by foreign subsidies that the FSR intends to address. It will then submit that, in the context of notifiable concentrations, the relevant foreign subsidies for the substantive assessment under the FSR are limited to those that have a link to the concentration, because they are granted to undertakings that use them to fully or partially finance the concentration. The paper will then conclude that a focus on likely concerns will allow the Commission to significantly narrow the reporting requirements required under the notification form.

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After less than two years of debate, the European Union (“EU”) has adopted the Regulation on foreign subsidies distorting the internal market (“FSR”).² This brand-new regime constitutes an important policy instrument intended to capture distortions of the EU internal market caused by foreign subsidies. The FSR is based on the consideration that whereas companies active in the EU are subject to State aid rules when they are granted support from a public entity of an EU Member State, in general, companies financially supported by non-EU countries are not. This may result in a competitive advantage for companies supported by non-EU countries over companies supported by EU Member States or not supported at all. The FSR aims in substance at levelling the playing field by extending its State aid regime to subsidies in the rest of the world to the extent that those subsidies impact on the internal market.

According to its preamble, the FSR should be applied and interpreted in light of the relevant EU legislation, including rules relating to State aid, merger control and public procurement.³ Such general reference notwithstanding, there is currently a lack of guidance how the substantive rules of the FSR are supposed to apply in practice. This lack of guidance has been exacerbated by the very far reaching information requests set out in the notification form of large concentrations that are subject to Commission’s clearance where they exceed certain thresholds, as annexed to the draft implementing regulation for the FSR.⁴

The remainder of this paper is structured as follows: Section I takes a closer look at the distortion of the internal market from foreign subsidies that the FSR intends to address. Section II focuses in particular on foreign subsidies in the context of notifiable concentrations and identifies the nexus required for foreign subsidies to be caught by the FSR, namely that foreign subsidies are used by undertakings to fully or partially finance the concentration in question. Section III provides suggestions on how the notification requirements (in particular in relation to concentrations) can be narrowed in light of the scope of the substantive concerns. Section IV concludes.

I. THE DISTORTIONS OF COMPETITION BY FOREIGN SUBSIDIES IN THE INTERNAL MARKET

The purpose of the FSR is “to contribute to the proper functioning of the *internal market* by establishing a harmonized framework to address *distortions* caused, directly or indirectly, by *foreign subsidies*, with a view to ensuring a level playing field” (emphasis added).⁵ The Commission’s substantive assessment (i) relates to foreign subsidies, and not merely foreign financial contributions as suggested in the draft implementing regulation, (ii) the foreign subsidies have to lead to a distortion (actual or potential negative effects on competition) and (iii) the distortion has to occur on the internal market.

A. Foreign Subsidy: Foreign Financial Contributions Conferring an Undue Advantage to Certain Undertakings

A foreign subsidy is deemed to exist “where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.”⁶

The concept of a foreign subsidy presents significant similarities with the notion of State aid which requires a measure granted by the State and through State resources, that confers, on a selective basis, an economic advantage, that is not available on the market and which is liable to affect trade between Member States and to distort competition.

Foreign subsidies can cover a wide range of public interventions, including from public and private entities whose actions can be attributed to the third country.⁷ Financial contributions could relate to virtually any transfer of value such as direct grants, capital injections, debt forgiveness, loan guarantees, etc. but also the foregoing of revenues such as tax exemptions or the granting of special or exclusive rights without adequate remuneration, and even the provision or purchase of goods or services.⁸

² Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330.

³ Recital 9 FSR.

⁴ Draft implementing regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (“draft implementing regulation”).

⁵ Article 1(1) FSR.

⁶ Article 3(1) FSR.

⁷ Article 3(2) second lid FSR.

⁸ Article 3(2) first lid FSR.

However, as under State aid law, the presence of foreign financial contribution is not sufficient to trigger a Commission's investigation. A foreign subsidy only exists if the foreign financial contribution is granted on a selective basis and confers a benefit on an undertaking that it could not have obtained under normal market conditions.⁹ To determine whether a benefit accrues to an undertaking, the preamble of the FSR suggests using comparative benchmarks such as investment practices of private investors or financing rates obtained on the market. Where such direct benchmarks are unavailable, alternative, generally accepted assessment methods can be used. The detection of a benefit follows the same logic as developed in State aid law with the market economy operator test. This test consists of comparing the behavior of public entities with that of similar private economic operators operating under normal market conditions, in order to determine whether an economic transaction carried out by the public entities confers an advantage to their counterparts.

B. Distortion: Actual or Potential Negative Effects on Competition

A distortion would be found “where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market *and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market*” (emphasis added).¹⁰

By way of comparison, Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”) prohibits State aid “when it is *liable* to improve the competitive position of the recipient compared to other undertakings with which it competes” (emphasis added).¹¹ That would be the case even in the absence of any *actual or potential negative effects*, e.g. if the aid does not help the recipient undertaking to expand and gain market share.¹² To establish a distortion under State aid rules, it is sufficient to demonstrate that a recipient of an aid has received an economic advantage (“something for nothing”) and that there is competition on or for the market in which the recipient is active.¹³ If distortion of competition does not need any effects-based competition analysis to find that there is an aid,¹⁴ such distortion may nevertheless impede the Commission from declaring aid compatible with the internal market under Article 107(3)(c) TFEU where the positive effects of aid cannot outweigh the negatives.¹⁵

While the wording used in the FSR is similar to that in State aid provisions, contrary to Article 107(1) TFEU, in the context of the FSR the distortion can generally not be presumed but has to be established by an effects-based analysis.

The FSR invites the Commission to determine the existence of a distortion on the basis of a non-exhaustive set of indicators.¹⁶ The choice of indicators reflects the potential lack of transparency of foreign subsidies - contrary to State aid that is supposed to be publicized - and the complexity of the commercial reality, making it “difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market.”¹⁷ The indicators to take into account include (a) the amount of the foreign subsidy, in absolute terms or in relation to the size of the market or to the value of the investment;¹⁸ (b) the nature of the foreign subsidy; (c) the situation of the undertaking, including its size and the markets or sectors concerned, for instance, foreign subsidies in markets characterized by overcapacity or leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to

9 Recital 13 FSR.

10 Article 4(1) FSR.

11 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ [2016] C 262/1 point 187.

12 *Ibid.* point 189.

13 For an analysis of the application of the standard of proof of the criterion of distortion of competition in the definition of State aid under Article 107(1) TFEU, see C. Ahlborn & C. Berg, “Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules,” in *The Law of State aid in the European Union*, (2004).

14 C. Ahlborn & C. Berg, *supra* note 13, 46.

15 This approach has been refined by the Commission following Case C-594/18 P *Commission v. Austria (Hinkley Point C)*, see also the Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022, points 63-69.

16 Article 4(1) and recital 18 FSR.

17 Recital 18 FSR, the wording of which stems from the European Commission's White Paper on levelling the playing field as regards foreign subsidies, 16 at s.4.1.3.2, COM(2020) 253.

18 Recital 19 FSR, in which the legislator indicated that a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive.

cause distortions;¹⁹ (d) the level and evolution of economic activity of the undertaking on the internal market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market. The Commission will publish guidelines on the application of those criteria by 2026.²⁰

The FSR is concerned that companies would benefit from a competitive advantage over other companies that have not received State support and could outbid,²¹ create dominance²² or lead to inefficient overall resource allocation and loss of competitiveness and innovation of these other companies.²³ It is feared that foreign subsidies are granted to pursue strategic objectives “to establish strong presence in the EU or to promote an acquisition and later transfer technologies to other production sites, possibly outside of the EU.”²⁴

Companies which are seen as deserving protection via the FSR include those that were prohibited from acquiring other companies because they obtained State aid,²⁵ as well as companies that have received State support, but which was deemed to be necessary, proportionate and not unduly affecting trade conditions, under State aid law.

These theories of harm are not relied upon in EU merger control and there have been to date only a handful of cases where subsidies were considered in the competition assessment.²⁶

Similar to the State aid rules,²⁷ the FSR also allows the Commission to balance the distortion of competition on the internal market caused by a foreign subsidy with its positive effects in terms of the development of the activity in the internal market and in terms of policy objectives,²⁸ in particular those of the EU, such as environmental or social protection.²⁹

In certain limited circumstances, there would not be any need for the Commission to proceed to an effects based analysis but instead the Commission can rely on presumptions.³⁰ Article 5 FSR presumes that foreign subsidies distort the internal market when they fall under one of the following categories (hereafter referred to as the categories of foreign subsidies deemed to be the most distortive): (a) a foreign subsidy granted to an ailing undertaking, which would likely go out of business without the subsidy, unless there is a restructuring plan to restore the long-term viability of the company and which includes a significant own contribution by the subsidy recipient itself; (b) a foreign subsidy in the form of unlimited guarantee for the debts or liabilities of the undertaking; (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) a foreign subsidy directly facilitating a concentration and (e) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender. The three first categories of subsidies correspond to the types of State aid considered as unduly creating

19 *Ibid.*

20 Article 46(1)(a) FSR.

21 See European Commission’s White Paper, *supra* note 17. In Annex 1 relating to the notifiable concentrations to the draft implementing regulation, the Commission requests detailed information on the bidding process, if there had been one organized by the seller, and on any due diligences conducted and discussing notably the value of the transaction.

22 Subsidies, Competition and Trade, OECD Competition Policy Roundtable Background Note, 2022, 20. In sub-section 6.6 of Annex 1 to the draft implementing regulation, the Commission requests from the merging parties to explain in the notification, for each foreign financial contribution having a link with the concentration, whether and how it is liable to improve, directly or indirectly, the competitive position in the internal market (as compared to the situation before the concentration) of the merging parties.

23 European Commission’s White Paper, *supra* note 17.

24 *Ibid.*

25 See for instance Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ [2014] C 249/1 (“R&R aid guidelines”), points 55 and 84; Communication from the Commission - Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01), point 71.

26 OECD Competition Policy Roundtable Background Note, *supra* note 22, footnote 35 and cases referred into.

27 Article 6(2) FSR.

28 *Ibid.*

29 Article 5 FSR.

30 Recital 20 FSR.

negative effects on competition because of their nature or their form,³¹ and therefore to be incompatible with the internal market.³² Under the FSR, these presumptions can be rebutted.³³

C. Impact on the Internal Market

Article 1(2) FSR specifies that “[t]his Regulation addresses foreign subsidies granted to an *undertaking*, including a public undertaking which is directly or indirectly controlled by the State, *engaging in an economic activity in the internal market*. Among others, an *undertaking acquiring control of or merging with an undertaking established in the Union* or an undertaking participating in a public procurement procedure in the Union is considered to be engaging in an economic activity in the internal market” (emphasis added). Hence, for the substantive assessment, irrespective of whether the tool is an *ex officio* investigation, a notifiable concentration, or a notifiable public procurement procedure (i.e. a concentration or public procurement above certain thresholds), there must be a *link* between the foreign subsidy and the economic activity of an undertaking in the internal market.

Although foreign subsidies may possibly distort competition, there must be a nexus with the EU for the Commission to investigate foreign subsidies which links the distortion to the internal market, i.e. with an economic activity in the EU.

In *ex officio* cases, for a foreign subsidy to be investigated, it must have a link to any type of economic activity engaged into in the EU, provided that it is not already subject to other legislation, such as for instance the import of goods in the EU subject to the Anti-subsidy Regulation³⁴ implementing the World Trade Organization Agreement on Subsidies and Countervailing Measures in the Union.³⁵ This may also involve investigations into non-notifiable concentrations in which case the investigation would not relate to the concentration itself, but to the foreign subsidy as it benefits the entity resulting from the concentration.

II. FOREIGN SUBSIDIES IN THE CONTEXT OF NOTIFIABLE CONCENTRATIONS

The economic activity triggering an investigation by the Commission depends on the tool used: *ex officio* investigation, notifiable concentration, or notifiable public procurement procedure. When considering a notifiable concentration, the economic activity envisaged is the notifiable concentration. This is confirmed by Article 19 FSR:

When assessing whether a foreign subsidy in a concentration distorts the internal market (...), that assessment shall *be limited to the concentration concerned*. Only foreign subsidies granted in the three years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest shall be *considered in the assessment*. (emphasis added).³⁶

To assess relevance of the foreign subsidy in the context of a notifiable concentration, it ought to be determined whether the concentration was fully or partially financed through that foreign subsidy, either directly or where there is a sufficiently close link between the merging entity and the beneficiary of the subsidy.

The concern of the FSR as regards concentrations is that “foreign subsidies can distort the internal market and undermine the level playing field for various economic activities in the Union. This could in particular occur in the context of concentrations entailing a change of control over Union undertakings, where such concentrations are *fully or partially* financed through foreign subsidies (...)” (emphasis added).³⁷

31 *Ibid.*

32 R&R aid guidelines, *supra* note 25, point 6; Case C-559/12 *France v. Commission (La Poste)*; Case C-438/16 P *Commission v. France and IFP Énergies nouvelles*.

33 Article 5(2) FSR and recital 20 FSR. The FSR also establishes an irrebuttable presumption for the absence of distortions, namely some foreign subsidies would be considered not to distort the internal market where its total amount does not exceed the *de minimis* aid amount under Regulation (EU) No 1407/2013, currently set at €200,000 per third country over any consecutive period of three years (Article 4(3) FSR). Such foreign subsidies are outside the scope of the FSR. There also exists a rebuttable presumption of absence of distortion that the Commission can rebut is that a foreign subsidy where the total amount of which a foreign subsidy does not exceed €4 million over any consecutive period of three years, is unlikely to distort the internal market (Article 4(2) FSR).

34 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ [2016] L 176/55.

35 Article 44(2) FSR.

36 See also recital 37 FSR.

Therefore, when notified with a concentration under the FSR, it would appear from the preamble of the FSR that the Commission would be empowered to examine foreign subsidies granted to undertakings that effectively use such foreign subsidies to fully or partially finance the concentration.

In certain circumstances, it may be obvious that a foreign subsidy is granted to fully or partially finance a concentration. This may appear from the intention of the grantor (e.g. because the subsidy is granted to specifically expand an activity in the EU) or from the context (e.g. because it is part of a national program to expand economic activities abroad). In such cases, no further demonstration of the existence of a nexus would be required. However, in many other circumstances, this may not be obvious, and the Commission would have to demonstrate a sufficient nexus between the foreign subsidy and the concentration.

A clear nexus between the subsidy and the concentration could be if the merging entity and the beneficiary are part of the same “undertaking.” When determining the recipient of foreign subsidies in the context of concentrations, the notion of “undertaking” is not defined in the FSR. As per the EU case law,³⁸ the contours of the relevant entity are not necessarily the same for the substantive analysis than for jurisdictional purposes.³⁹

In State aid law, unlawful aid found to be incompatible with the internal market must be recovered from the *beneficiaries that actually benefitted* from it,⁴⁰ to restore competition. The actual beneficiary of an aid could be the legal entity that has received the aid. It could also be several separate legal entities if they form a single economic unit,⁴¹ i.e. there is between the entities “a controlling share and the existence of other functional, economic and organic links.”⁴² In that respect, the EU Courts recognize that the Commission “has a wide discretion in determining whether companies forming part of a group must be regarded as an economic unit or as legally and financially independent for the purposes of applying the State aid rules.”⁴³

In its decisional practice, the Commission already considered that “the fact that several companies belong to the same corporate group (as sister companies or parent/subsidiary companies) does not necessarily mean that all those companies are ipso facto beneficiaries (within the meaning of State aid rules)(...).”⁴⁴

When considering redressing potential distortions of competition on the internal market caused by foreign subsidies, the relevant EU legal framework appears to be State aid law and therefore, the *actual* beneficiary must be identified.

As the FSR’s remit is limited to the EU, the starting point is to verify whether the legal entity party to the notified concentration has received, *directly or indirectly*, a foreign subsidy. If that legal entity has directly received a foreign subsidy, the necessary nexus with the concentration would be established. If however that legal entity has not itself directly received a foreign subsidy, further analysis would be needed to assess whether the necessary nexus with the notifiable concentration exists. The preamble of the FSR gives as an example that “[t]ransfer pricing in the context of goods and services exchanged within an undertaking can confer a benefit if that *transfer pricing is not in line with normal market conditions*” (emphasis added).⁴⁵ More generally, it states that “[t]he benefit conferred by a financial contribution may be *passed to* an undertaking engaging in an economic activity in the Union” (emphasis added).⁴⁶ Hence, although a legal entity has not directly received a foreign subsidy, it could have received indirectly a foreign subsidy because of an advantageous transfer of value from another legal entity of the single economic unit having received a foreign subsidy.

38 See for instance Case T-541/08 *Sasol v. Commission* (“Candle waxes”) paras 49-50.

39 Please note that at the time of writing this paper, the draft implementing regulation seem to rely on the same perimeter of undertaking for the substantive analysis as for the jurisdictional purposes (i.e. all group entities).

40 Case C-277/00 *Germany v. Commission* (“SMI”) para 75.

41 Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid, OJ [2019] C 247/1, points 85 and subs.

42 Case T-643/20 *Ryanair v. Commission* para 45.

43 Case T-234/95 *DSG v. Commission* para 124; Joined Cases T-371/94 and T-394/94 *British Airways v. Commission* para 314.

44 Commission decision of 16 July 2021 on State Aid measure SA.57116 (2020/N) – The Netherlands, COVID-19: State loan guarantee and State loan for KLM, referring to Case C-457/00 *Belgium v. Commission* (*Verlipack*) paras 55-60; Joined cases T-111/01 and T-333/01 *Edelmetalle v. Commission* paras 84 and 121-125; Case T-371/94 *British Airways and others and British Midland Airways v. Commission* paras 297, 314 and 315.

45 See recital 13 FSR.

46 *Ibid.*

III. THE IMPLICATION OF THE SUBSTANTIVE ASSESSMENT OF THE FSR ON THE NOTIFICATION REQUIREMENTS

In its draft implementing regulation, the Commission requires from the parties to a notifiable concentration to report all foreign financial contributions received by all group entities over the past three years that are above a certain amount, irrespective of whether or not they amount to foreign subsidies, whether they are likely to distort competition or have any link to the internal market.

This request has been severely criticized by companies, including EU businesses.⁴⁷ The most common criticism is that the draft implementing regulation requests too far reaching information to be reported, which creates “a disproportionate burden for EU and non-EU businesses with a global presence,”⁴⁸ or “will result in an extremely complex administrative ordeal” and “is practically impossible to implement.”⁴⁹ Companies consider that they are not equipped to monitor all foreign financial contributions.⁵⁰ They also stress that this administrative burden is “not necessary for the FSR to reach its objective.”⁵¹ They advocate to limit the reporting to the categories of foreign subsidies deemed to be the most distortive.⁵²

Given the mismatch between the focus of the FSR (as described in the previous sections above) and the extensive information request, such information request is clearly disproportionate since many if not most interactions with third countries would not be within the scope of the FSR.

Therefore, the information request for notifiable concentrations should focus on the elements that are necessary for the Commission to conduct the substantive assessment under the FSR.

First, where the legal entity that is party to the notifiable concentration has been directly granted financial contributions by a third country, information on that source of finance should be provided if it is likely to amount to a foreign subsidy. That would exclude reporting foreign financial contributions that are granted at market terms (e.g. a loan from a public bank concluded at market terms).

Second, the information request should also be limited to foreign subsidies that are likely to distort the internal market. Would be excluded at least the subsidies presumed not to distort the internal market under the FSR.

Third, where the legal entity is part of a group, (additional) information on foreign subsidies likely to distort the internal market may be requested if it is likely that this entity has received an advantageous transfer of value from other legal entities that have received foreign subsidies and with which it forms a single economic unit, in the meaning of State aid law.

IV. CONCLUSIONS

By filling a regulatory gap left by EU State law that only applies to support granted to companies by EU Member States but not by foreign countries, the FSR has created a new instrument to address distortive foreign subsidies granted to undertakings engaging in an economic activity in the internal market. Among the economic activities that fall in the scope of the FSR are concentrations, above certain thresholds, that must be notified to the Commission. This paper examined how the substantive assessment of the FSR should apply to notifiable concentrations and its consequences in terms of the information request in the notification form.

47 Comments available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them_en.

48 See for instance the Joint Statement of various associations (American Chamber of Commerce to the European Union, InvestEU, Japan Business Council in Europe, British Chamber of Commerce | EU and Belgium, Korea Business Association Europe, etc.) accessible at : https://www.amchameu.eu/system/files/position_papers/fsr_ir_joint_industry_statement_4th_april_2023_final.pdf.

49 See the Multi-Company letter of AstraZeneca PLC, Intel, Solvay, Siemens Energy AG, Deutsche Telekom, BASF SE, etc. published by MLex and accessible at https://content.mlex.com/Attachments/2023-03-29_8EX94G2C4K726V7Y%2FFSR%20Multi-Company%20Letter.pdf.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

In our view, the FSR is concerned with distortive foreign subsidies linked to the notified concentration. As suggested in the preamble of the FSR, the Commission would be empowered to examine foreign subsidies that can be used by the undertaking engaged in the merger to fully or partially fund the concentration in the EU. Only foreign subsidies granted to the undertaking, i.e. the single economic unit, and actually benefitting the legal entity engaging in the concentration in the EU would appear to be relevant to examine.

Distortion of the internal market should be determined keeping in mind the relevant theories of harm under the FSR, and examining the set of indicators laid down therein. To conduct its substantive assessment, the Commission should request information that is relevant for the purposes of the FSR.

Information requests should be proportionate and reflect the substantive concerns. In particular, they should be limited to third countries' measures that can be used by the undertaking, party to the concentration, to finance fully or partially the notifiable concentration, when these measures are likely to amount to foreign subsidies, because they are not market conform or not generally available to any company, and are likely to distort the internal market, i.e. they are of a certain amount. Where the legal entity is part of a group, (additional) information on foreign subsidies likely to distort the internal market may be requested if it is likely that this entity has received an advantageous transfer of value from other legal entities that have received foreign subsidies and with which it forms a single economic unit, in the meaning of State aid law.



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