

Hoarding of Personal Protection Tools during the Covid-19 Pandemic: Criminal Law Study on Consumer Protection

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Abstract

During the pandemic, some unscrupulous perpetrators hoard Personal Protective Equipment (PPE), which then causes a shortage and an increase in the price of PPE. This is a problem that is quite worrying for consumer protection. This study will examine how criminal law in consumer protection looks at the issues regarding the hoarding of PPE by these elements. The research will be carried out using a normative juridical method. The approach used is a statute approach and a conceptual approach by looking at the law, research results, and previous studies related to this research. The study results found that criminal law plays an essential role in consumer protection. Then this criminal law can be used to take action against the perpetrators of hoarding PPE based on the Trade Law and the Business Competition Law.

Keywords

personal protective equipment (PPE); criminal law; hoarding; consumer protection; covid-19



I. Introduction

This article discusses the hoarding of Personal Protective Equipment (PPE) during the COVID-19 pandemic regarding criminal law in consumer protection. Discussion of this issue is urgent for at least two reasons: the massive phenomenon of hoarding PPE during a pandemic and the need for legal instruments to be empowered to solve the problem of hoarding PPE. In this article, as the second reason, legal instruments are focused on criminal law in consumer protection (Keitner, 2020).

The outbreak of this virus has an impact of a nation and Globally (Ningrum *et al*, 2020). The presence of Covid-19 as a pandemic certainly has an economic, social and psychological impact on society (Saleh and Mujahiddin, 2020). Covid 19 pandemic caused all efforts not to be as maximal as expected (Sihombing and Nasib, 2020).

Indonesia, being one of the nations affected by Covid-19, is not immune to these issues. Several tangible examples in the sphere of the economic impact of Covid-19 are the numerous economic violations that are damaging and violate ethical and legal standards (Miconi *et al.*, 2021). One is in consumer protection, specifically the enormous quantity of items and economic demands during this epidemic, which causes some individuals to panic buy, hoard things for fundamental needs, or sell them at the highest possible prices, and so on. These conditions create conflicts within the community, as many people sense a desire for them but are unable to fulfill it due to the lack of available commodities (Ardyan *et al.*, 2021).

The classification of PPE as basic or essential goods has caused debate because neither the Law nor the Presidential Regulation Number 71 of 2015 concerning the Determination and Storage of Basic Needs and Important Goods (Perpres No. 71 of 2015) as implementing regulations do not state the goods in question. Meanwhile, under the Business Competition Law, hoarding of PPE may involve monopolistic practices and

unreasonable pricing (Chow, 2016). Such conditions at least prove that the hoarding of PPE by unscrupulous business actors has indeed been a serious problem, considering that PPE is currently not only a need for a few individuals but the needs of all communities and countries (Dodds et al., 2020).

Based on these reasons, this article will discuss the use of criminal law instruments to solve hoarding PPE during the COVID-19 pandemic, which has not been widely discussed, especially in journals. There is an article “Implementation of Criminal Sanctions for Hoarders of Masks in Indonesia during the Covid-19 Pandemic”, but the discussion is limited to PPE in the form of masks, and the study is also limited to the Trade Law. In this article, the issue of hoarding PPE is examined based on the criminal law instruments in the field of consumer protection contained in the Trade Law and the Business Competition Law.

In discussing the criminal law aspects of consumer protection in the hoarding of PPE during the Covid-19 pandemic, this article begins with explaining the criminal law aspects of consumer protection. This study analyzes the relationship between criminal law and consumer protection and the role and objectives of implementing criminal law in solving consumer protection violations. The following section discusses the scope of regulation of criminal offenses in consumer protection that is relevant to ensnare PPE hoarders during the Covid-19 pandemic. This study analyzes two provisions of the law which materially contain consumer protection, namely the Trade Law and the Business Competition Law. With such a scope, it is hoped that at the end of the article, it is expected that conclusions can be drawn about what aspects of criminal law in the Trade Law and the Business Competition Law can be enacted to ensnare perpetrators of hoarding PPE during the Covid-19 pandemic.

II. Review of Literature

Criminal Law in Consumer Protection

Consumer law and consumer protection law cannot be separated from one another. Apart from both discussing consumer issues, it is said that consumer protection law is one part of the discussion on consumer law. Consumer law stems from the meaning of a set of principles or specific legal rules that regulate the economy related to consumer goods or services in terms of relationships and problems between various parties (Malala, 2018). Meanwhile, consumer protection law is a unique form of consumer law that emphasizes how a law is implemented to ensure certainty of the fulfillment of the protection of consumer rights. This can also be seen from the explicit meaning in the Consumer Protection Law regarding the definition of consumer protection, namely “all forms of efforts to ensure the presence of legal certainty and protection for consumers” (Corones & Galloway, 2013).

In the aspect of criminal law, consumer protection law plays a significant role in preventing and eradicating consumer violations. This is related to the particular characteristics of criminal law, which is also referred to as the law of sanctions, so it can be illustrated that if a violation in this field of law occurs, it will directly result in suffering, misery, or all other forms of bodily discomfort (Belwal et al., 2020). With firm sanctions capable of attacking fundamental human legal interests, it is not surprising that criminal law is greatly feared and avoided by everyone. Such conditions also make criminal law very important for consumer protection. Consumers are considered to have a weak position with increased legal support through criminal law instruments capable of becoming the basis of the latest protection (Brownlee, 2021).

Consumer protection criminal law is slightly different from other conventional forms of crime. It is included in the *mala prohibita* category, which stipulates that the evil nature of the act of violating consumer protection is the result of the statutory provisions that determine so. Such conditions specify that the aspect of consumer protection is a close part of the development of offenses about how the evil nature of an act can also be seen not only through the direct physical consequences and victims of existing consumer violations (Sinaga et al., 2020). The position of criminal law has a role in enforcing criminal law as an alternative to solving problems of consumer violations that are included in the criminal realm because, in principle outside of the provisions of criminal law, consumer law and consumer protection law are parts that are included in the domain of contract law between consumers and business perpetrators (Rusyudianta, 2021).

The role of criminal law as a last resort makes this type of law the most effective alternative because other fields of law are not effective in tackling a particular legal problem. Moreover, talking about violations in criminal law has entered the realm of public law, which places the state responsible for these violations. Criminal law in consumer protection is a concrete form of state control to realize the welfare of its citizens by empowering consumers to obtain their rights and creating a dynamic and favorable economic climate.

III. Research Method

This research will be carried out using a normative juridical method to find the expected results. Furthermore, researchers will use the statute approach and conceptual approach. Through a literature study, this approach will then be applied to various previous studies and studies, as well as to multiple laws and regulations that are still related to the discussions in this research.

IV. Results and Discussion

4.1 Hoarding of PPE During the Covid-19 Pandemic as a Violation of Criminal Law in the Field of Consumer Protection

From discussing the position and role of criminal law in consumer protection, it is known that criminal law instruments play an essential role in ensuring legal security for consumers. Such urgency will become even more crucial when considering an emergency like the current COVID-19 pandemic. In this context, the presence of criminal law is expected to regulate the lives of people who have different life interests and are vulnerable to conflicts of interest or causing harm and negate particular claims so that the realization of public order as it should be.

In a pandemic situation, applying criminal law with strict sanctions is very important to prioritize against perpetrators who hoard PPE. As discussed earlier, criminal law may play a role more than just its enforcement in ordinary conditions with the principle of *ultimum remedium*, but instead plays the opposite position as a *primum remedium* or a top priority effort due to pandemic conditions. Because, in a pandemic situation, the presence and availability of PPE are significant for the community and even the country. In such conditions, the relevant criminal law instruments are placed as the *primum remedium* for violations in the field of consumer protection, considering that this form of breach is very despicable and poses a severe threat to the survival of human life. These conditions and situations make it possible to change the nature of criminal law from the *ultimum*

remedium to the primum remedium to alleviate the problem of hoarding PPE as a violation of consumer protection.

As described in the introduction, the problem of hoarding PPE by some business actors so that it becomes rare and can be sold in the market at unreasonable prices illustrates that these violations are threatening or even violating the community's interests as consumers. Through consumer protection criminal law instruments in this context, the state's role can be the best choice to resolve violations of these business actors who have violated legal provisions and consumer rights. Because in this article, as stated in the Introduction section, hoarding is defined as "the process, method, act of hoarding; collection" or "illegal activities in collecting goods whose ownership is restricted by law," then the statutory provisions governing the restriction of collection or possession of goods intended to protect consumers can undoubtedly be used in connection with the stockpiling of PPE. In this case, the provisions regarding the hoarding of goods for the benefit of consumers are seen in the Trade Law (Law Number 7 of 2014) and the Business Competition Law (Law Number 5 of 1999).

4.2 Trade Law

The Trade Law is a law that regulates trade activities, namely "a sequence of activities related to transactions of goods and services within the country and beyond the borders of the country to transfer rights to goods and services to obtain compensation or compensation." This means that this law also regulates transaction activities related to PPE in the context of the problems in this article. The existence of regulations regarding trade itself shows that in economic activities, including business, the role of the government is absolute, so that, among other things, the availability of public goods and the avoidance of market failures.

Concerning the hoarding of PPE, which then impacts the scarcity of its availability and the price soaring high, this indicates the unavailability of public goods and market failure. Therefore, government intervention in this matter is essential. This article does not discuss direct government intervention in PPE provision but rather how criminal law instruments can ensnare parties who fail to provide PPE or the market mechanism. Therefore, activities that are intended to hamper PPE availability in the trade need to be reviewed more in the Trade Law.

In the Trade Law, some provisions regulate the prohibition of activities that cause the availability of goods to become scarce, namely the provisions of Article 107.

"Business actors who store goods of basic needs and important goods in a certain amount and time at the time of scarcity of goods, price fluctuations, and traffic barriers to goods trade as referred to in Article 29 paragraph (1) shall be punished with imprisonment for a maximum of 5 (five) years and a maximum fine of Rp. 50,000,000,000.00 (fifty billion rupiahs)."

This provision, in principle, prohibits business actors from storing basic and essential goods in specific quantities and for a certain period when they experience scarcity, price increases, and trade barriers. Such storage activities are usually referred to as provisions concerning the prohibition of hoarding goods.

Applying the provisions of Article 107 of the Trade Law to ensnare the perpetrators of hoarding PPE is indeed debatable. In this provision, the storage or hoarding of "basic or important goods." These basic or essential goods were further regulated in Presidential Regulation No. 71 of 2015. In this Presidential Regulation, "essential goods" are defined as "goods that concern the livelihoods of many people with a large scale of the fulfillment of needs and become a supporting factor for people's welfare." In contrast, "essential goods"

are defined as “strategic goods that play an important role” in determining the smooth running of national development.” This Presidential Regulation then limitedly determines the essential goods consisting of basic goods from agricultural products, industrial products, and livestock and fishery products. Meanwhile, essential goods are also limited in rice, corn, and soybean seeds; fertilizer; three kilograms of LPG; plywood; cement; steel construction; and mild steel. Within these two limiting limitations, PPE is not found either as a basic item or as an essential item, even though functionally, during the current Covid-19 pandemic, it is clear that its existence is fundamental because it involves the safety and health of the community and especially medical personnel.

However, Presidential Decree No. 71 of 2015 still provides opportunities to expand primary and vital goods. This is because Article 2 paragraph (7) stipulates that the types of primary and essential goods specified in a limited manner can be changed based on the minister’s proposal after coordinating with the minister or the head of the relevant non-ministerial government agency. This change is related to the existence of PPE, which is possible, especially for the category of essential goods. In this Presidential Decree, it is stated that the determination of the types of crucial goods is carried out based on the strategic nature of national development,⁴² which considers the provisions to support government programs and high price disparities between regions.

Because PPE during the pandemic is an item that is very much needed to maintain the health and even safety of the public and especially medical personnel, there should be a change regarding the classification of essential goods. In a pandemic situation, of course, it has also become a government program to make various efforts to reduce and inhibit the spread of this virus for which there is no cure. PPE itself is needed to reduce and inhibit its spread. This is evident from recommendations and even a ban on public spaces that do not use specific PPE. Such conditions deserve to be used as a basis for classifying PPE as one of the critical types of goods.

Concerning law enforcement to take action against perpetrators of hoarding PPE, this encourages legal discovery (*rechtsvinding*) and interpretation by law enforcement officials. This condition can undoubtedly refer to one of the Hogeraad Decisions on January 31, 1919, which understands that unlawful acts known in Article 1365 of the Civil Code (KUHPerdata) are not only interpreted as illegal acts written form but also unwritten. In criminal decisions, this is not easy because the principles of criminal law are based on the principle of legality. This principle becomes very fundamental with one of its unique characteristics, namely the prohibition of using analogies, meaning that every law enforcement officer in terms of enforcing criminal law may not make interpretations that are outside the intent of the legislator or equate it with something that is not the same as something else.

Nevertheless, legal discovery can still be carried out if an unlawful nature exists in the violation. This unlawful nature in a criminal act is interpreted by referring to the argument that an action can be called a criminal act if the nature of the action (*Wesen*) is “*dem Wesen nach*” in line with the intent of the intended criminal law provisions. Such conditions are the basis for law enforcement officers to use legal considerations by using systematic interpretation as a middle way, namely interpretations that focus on the uniformity of other statutory provisions governing the same thing. This foundation also seems to be the basis for the issuance of the Minister of Trade Regulation Number 34 of 2020 concerning the Second Amendment to the Regulation of the Minister of Trade Number 23 of 2020 concerning the Temporary Prohibition of Exports of Antiseptic, Raw Material for Masks, Personal Protective Equipment and Masks, which has accommodated the ban on the export of PPE due to goods conditions that are increasingly unstable during

the covid-19 pandemic. The regulation indirectly confirms that the interpretation of PPE as an essential item as stipulated in the Trade Law is not an analogy but a systematic interpretation of the intent of the statutory provisions governing similar matters. This is also in line to accommodate requirements for the determination of essential goods as regulated in Presidential Regulation No. 71 of 2015, which explains that the resolution of crucial goods is based on the nature of the goods considered strategic in national development. This commonality of intent also indirectly reaffirms that PPE is indeed worthy of being interpreted as necessary items during the Covid-19 pandemic.

However, clarifying statutory provisions into a systematic policy should also prioritize establishing PPE as part of essential goods. The Regulation of the Minister of Trade has accommodated the provisions regarding the prohibition on the export of PPE because of the needs and interests of the community and the state for these goods, so it is not meaningless with various considerations and turmoil that occur due to consumer violations of PPE that is stockpiled or misused by business actors. The provisions are adjusted to revise the types of essential goods with the minister's proposal after coordinating with the minister or the head of the relevant non-ministerial government agency. The Minister of Trade, through its regulations, can encourage the clarity of the position of PPE as an essential item by changing the rules regarding these types of goods. Therefore, it is not without reason that the categorization of PPE as an important item during the covid-19 pandemic can complete the abstract of criminal law enforcement on consumer protection for business actors who stockpile PPE as one type of essential item.

4.3 Business Competition Law

The Business Competition Law, or the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition in its entirety, is a piece of legislation that aims to protect the public interest, foster a healthy business climate, prevent monopolistic practices and unfair business competition, and promote business effectiveness and efficiency. Thus, the Business Competition Law mandates that business activities be conducted in a healthy manner and that monopolistic tactics and various business frauds be avoided in order to protect the public interest.

In the case of the issue discussed in this article, namely the hoarding of PPE, the appropriate Business Competition Law is applied when the hoarding is part of monopolistic practices and unfair business competition. The Business Competition Law defines ten distinct types of agreements and six prohibited acts. However, not all of the prohibited agreements and behaviors are relevant to the subject of this article. As a result, the next section outlines solely the prohibited contracts and conduct.

Initially, oligopoly. The prohibition of oligopoly is found in Article 4(1) of the Business Competition Law, which states that "business actors are prohibited from entering into agreements with other business actors to jointly control the production and or marketing of goods and services that could result in monopolistic practices or unfair business competition." This provision of business competition law is referred to as an oligopoly agreement, as it creates a market structure in which only a few business actors participate, hence affecting market prices and behavior of other businesses. Due to this mutual influence, there has been dependency between competing business actors in an oligopoly market, which forces business actors to consider their competitors' reactions when setting the selling price.

However, because the oligopoly agreement is a rule of reason provision, it is permissible as long as it does not result in monopolistic behaviors or unfair commercial competition. According to the Business Competition Law, an oligopoly exists when two or

three business actors or groups of business actors control more than 75% of the market share for a certain type of good. Concerning the stockpiling of PPE, an oligopoly should be considered if a single group of business actors has 75% of the power over the manufacturing and distribution of PPE, resulting in monopolistic practices or unfair business competition.

The second is the agreement on price fixing. This prohibition is based on Article 5 paragraph (1) of the Business Competition Law, which states that "business actors are prohibited from entering into agreements with competing business actors to fix the price of goods and or services that consumers or customers must pay in the same relevant market." In business rivalry, price fixing is one of the techniques used by business players to maximize profit, which plainly disregards the interests of other company actors and the general public as consumers. This restriction provision in business competition law is classed as per se illegal, which means that there is no need to establish if it results in monopolistic practices or unfair business competition; what is necessary is to establish that a price to be paid by consumers was agreed upon.

Concerning hoarding of PPE, this limitation on price fixing may be implemented if it is discovered that hoarding of PPE happens as part of an agreement to fix the price of PPE that consumers must pay. This could be because PPE becomes uncommon, and when it is available, the cost of obtaining it becomes prohibitively expensive. Thirdly, there is the cartel. This prohibition is based on Article 11 of the Business Competition Law, which states: "Business actors are prohibited from entering into agreements with business competitors to influence prices through regulation of the production and or marketing of goods or services, which could result in monopolistic practices or unfair business competition." In this section, the term "cartel" refers to the practice of regulating the manufacture or selling of an item. It could be tied to storing personal protective equipment (PPE), or it could be related to manufacturing arrangements, although it is more likely to be in marketing.

However, Article 11's cartel provision is a matter of common sense. This is because the term "may result in" is included, which signifies that the agreement is void if it results in monopolistic tactics or unfair commercial competition. If the agreement does not result in monopolistic tactics or unfair business competition, it is not unlawful.

Fourthly, there is monopoly. This prohibition is based on Article 17 paragraph (1) of the Business Competition Law, which states that "business actors are prohibited from exercising control over the production and or marketing of goods or services in a manner that results in monopolistic practices or unfair business competition." This limitation on monopoly is distinct from the previous three, which were included into an agreement. It must involve several business actors, but may be carried out by a single or a group of business actors. A single business actor or a group of business actors should be suspected of operating a monopoly if they control more than 50% of the market share for a certain type of goods or services, among other considerations. Because the term "may result in" is included in this provision, it follows the rule of reason that the control must have an effect on monopolistic behaviors or unfair commercial competition.

Two conditions must be met before the cartel's rules can be used to crack down on PPE hoarding activities. To begin, this hoarder is a business actor or group of business actors that control more than 50% of (specific) PPE manufacturing or marketing. Second, this hoarding results in monopolistic practices or unhealthy rivalry among businesses.

Fifth is market hegemony. This prohibition is based on Article 19 of the Business Competition Law, which prohibits business actors from engaging in one or more activities that could result in monopolistic practices or unfair business competition, including

limiting the circulation and sale of goods and services in the relevant market. This clause prohibits market control, which includes the stockpiling of PPE, limits on the circulation and sale of commodities, and acts that result in monopolistic tactics or unfair commercial competition. Due to the need that implications be established first, this condition is characterized as a rule of reason.

In the case of PPE hoarding, the prohibition of market control via limits on circulation or sales may be enforced. This is because the availability of PPE during this epidemic appears to be confined to specific parties, specific traders, which clearly results in monopolistic tactics or unfair commercial rivalry.

Due to the article's casuistic nature, it is impossible to establish which of the five agreements and acts prohibited here are most appropriate for cracking down on PPE hoarding during a pandemic. This is because each of the five has distinct characteristics of infractions, particularly the first three, which necessitate an agreement, even if it is not in writing. Simultaneously, the latter two are tasks that can be undertaken by a single business actor or a group of business actors. Because the first three require agreement, they are frequently referred to in the community as a cartel, despite the fact that they are legally distinct. Similarly, merely the price-fixing agreement, which is a violation, is sufficient to establish by the existence of a contract. In comparison, while specific deals or activities can be established, the others require additional evidence in the form of monopolistic tactics or unhealthy corporate rivalry.

From a criminal law perspective, the five prohibitions are likewise mentioned as prohibitions punishable by law. According to Article 48 paragraph (1) of the Business Competition Law, the prohibition of oligopoly, cartel, monopoly, and market domination carries a fine of up to 100 billion rupiahs or a maximum six-month prison sentence. According to Article 48 paragraph (2), the penalty for price-fixing agreements is a fine of up to 25 billion rupiah or imprisonment for up to five months in lieu of a fine. The distinction between criminal threats made under this forbidden arrangement or conduct appears to be between those classed as rational or, per se, illegal. Oligopoly, cartel, monopoly, and market dominance are all regarded as a violation of the rule of reason, whereas the ban of price-fixing agreements is categorically prohibited.

The criminal law instrument contained in the Business Competition Law is necessary and pertinent in order to pursue offenders of PPE hoarding during Covid-19. This is because this hoarding behavior is connected to the rights of those who have been violated and to a country in crisis over the requirement for personal protective equipment (PPE) during the Covid-19 pandemic. Thus, the availability of PPE and the cost of its ownership have an effect on the community's health and even safety. For the state, stockpiling PPE, which results in scarcity and high costs, obstructs the state's ability to fulfill its human rights and constitutional rights to health and health services.

The criminal provisions in the Business Competition Law, as discussed above, appear only to accommodate basic criminal sanctions in the form of fines or imprisonment instead. This means that violations of monopoly and unfair business competition are not subject to a principal sentence of imprisonment, the size of which has a very significant deterrent effect on individual perpetrators, mainly to protect the community and improve the perpetrators themselves.

Despite these weaknesses, other efforts from the aspect of criminal law can be taken to crack down on PPE hoarding, namely by applying additional criminal provisions other than the main crime. The Business Competition Law has numerous extra criminal provisions that apply to all criminal acts involving monopolistic tactics and unfair business competition. These provisions include the following:

- a. License revocation; or
- b. For a minimum of two years and a maximum of five years, business actors who are found to have violated this law are barred from serving as directors or commissioners; or
- c. Cessation of certain activities or actions that cause harm to other parties

In principle, the application of additional criminal provisions is an alternative. It is not a mandatory sanction or only an option if the principal penalty is insufficient. It does not mean that additional criminal sanctions are not so essential to be imposed because other penalties have unique characteristics with preventive or preventive purposes to be achieved against violations. Crime in the business competition itself is a criminal act with an economic motive, which means that financial analysis of the law can be an alternative to see the appropriate criminal sanctions for monopolists, namely by considering various principles such as value, utility, and efficiency, as well as its impact on society and the country to realize the greatest happiness. Thus, the principal and additional penalties can be equally and effectively enforced. This is also because the imposition of both the main and additional penalties is based on juridical considerations and non-juridical factors such as sociological, psychological, criminological, and even economic aspects. Therefore, the financial motive and the ongoing COVID-19 pandemic are solid reasons for the imposition of basic and additional penalties while cracking down on PPE hoarding, which can endanger public health and even safety.

V. Conclusion

This article concludes that criminal law instruments in consumer protection have an essential role in solving the problem of consumer protection violations. Criminal law, also considered a sanction law, has consequences of sorrow and suffering for perpetrators of violations. However, the application of criminal law in consumer protection still poses problems, apart from being the last law, also because it tends to produce abstract and collective victims and the difficulty of collecting evidence for prosecution. Although not yet fully effective, criminal law is a concrete form of state control to guarantee consumer rights and create a conducive economic atmosphere. Second, concerning the hoarding of PPE during the COVID-19 pandemic, criminal law in the field of consumer protection can play a role more than just a last resort (*ultimum remedium*), but as a top priority effort (*primum remedium*). This is due to the severe nature of the disgrace in the act of hoarding PPE during this pandemic so that it can threaten the survival of human life. Third, in the study of criminal law in consumer protection, several provisions related to consumer protection can be a choice to ensnare the perpetrators of hoarding PPE. In this article, it has been shown that the provisions of the Trade Law and the Business Competition Law can be applied. Criminal provisions can be implemented in the Trade Law by categorizing PPE as essential goods. Meanwhile, provisions in the Business Competition Law prohibiting monopolistic acts and unfair business competition, such as oligopolies, price fixing, cartels, monopolies, or market control, may be adopted to capture perpetrators of pandemic-related PPE hoarding. To be effective as a deterrence and preventive measure, the primary criminal laws and supplementary punishments must be enforced concurrently, taking into account the economic motivations for the crime and the ongoing pandemic scenario.

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