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THE REFORM OF THE DUBLIN SYSTEM AND THE BULGARIAN REGULATION ON MIGRATION

Abstract: the paper is aimed at presenting the last reforms of the so called Dublin system and its implications on the Bulgarian legislation, especially on the Law on Asylum and Refugee.

The Dublin system establishes the principle that only one Member State of the European union is responsible for examining an asylum application. The objective is to avoid asylum seekers from being sent from one country to another, and also to prevent abuse of the system by the submission of several applications for asylum by one person. The criteria for establishing responsibility range, in hierarchical order, from family considerations, to recent possession of a visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly or regularly. The focus of the analysis is on the discrepancies and problems of migrant smuggling and returns, as well the challenges for the national security.

Key words: *migration, Dublin system, asylum-seeker, Common European Asylum System, refugee, relocation*

1. INTRODUCTION

The increased migration flow challenged the European Union. Asylum flows are not constant, nor are they evenly distributed across the EU. They have, for example, varied from a peak of 425 000 applications for the EU 27 Member States in 2001 down to under 200 000 in 2006. In 2012 there were 335,895 applications [1].

While in 2001 425.000 asylum applications were lodged in the 27 Member States (peak in 2001), in 2006 there were under 200.000, in 2012 the

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number increased to 335.895. In 2013 the number of asylum-seekers rose to 431.000, in 2014 — to 627.000 and in 2015 — to nearly 1.300.000. The year 2015 was critical for the EU: the number of the asylum seeking applications in the 28 Member States was doubled in comparison to the one in 1992 (the EU consisted of 15 Member States).

According to Eurostat, 1.204.300 first time asylum-seekers applied for international protection in the EU in 2016, compared with 1.257.000 in 2015 and 526.700 in 2014 [2]. In absolute values, the EU Member States to receive the highest number of asylum-seekers in 2016 were Germany (722.300), Italy (112.200), France (76.000), Greece (49.900) and Austria (39.900).

According to the international Organization for Migration (IOM), 5.082 migrants lost their lives trying to cross the Mediterranean Sea in 2016, compared with 3.777 in 2015 and 3.279 in 2014. According to UNHCR, the number of dead or missing persons in the Mediterranean is 5.022 in 2016, 3.771 in 2015 and 3.500 in 2014.

The "Dublin legislation" was established by the Dublin Convention determining the State responsible for examining applications for asylum lodged in one Member States of the European Communities, signed on 15 June 1990.

The main aim of the Convention, stressed in the peamble was "to avoid any situation arising, with result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications...with a guarantee that their applications will be examined by one of the Member State and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum" [3].

In fact the objective was to avoid the simultaneous applications for asylum in more that one Member States and to exchange information on the applications lodged. The Convention is not in force and was replaced by the so called "Dublin System". Initially The Dublin System is based principally on two acts: the so called Dublin Regulation II, now replaced by Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 (Dublin Regulation III) and Regulation 2725/2000, the so called EURODAC valid until 20 July 2015 when the amended Regulation (EU) 603/2013 became applicable, repealed by Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 PE/29/2018/REV/.

The establishment of a Common European Asylum System (CEAS) has been a long and complex process which is far from finished and has shown serious faults during its implementation in practice. The work has been done in several stages, the first of which started in the period 1999–2006.

In 2006 the European Commission launched a review of the achievement, which was presented in the so-called Green Paper on the future Common European Asylum System [4]. This document, published in 2007, was too optimistic on the achievements, but realistic enough to state: "The process of evaluating the first stage instruments and initiatives is still underway, but, given the need to come forward with the proposals for the second phase in time for their adoption in 2010, it is essential to embark already now on an in-depth reflection and debate on the future architecture of the CEAS"[5]. The assessment how the existing instruments were implemented was presented in the Policy Plan on Asylum in June 2008 [6]. The document pointed out that three pillars undermined the establishment of the Common European Asylum System: the lack/insufficient harmonization of protection standards by further aligning of Member States' asylum legislation; lack of effective and well-supported practical cooperation and the lack of an increased degree of solidarity and sense of responsibility among the Member States, as well as between the EU and third countries.

2. THE DUBLIN SYSTEM IN FORCE

The now acting Dublin system contains the following acts:

— The Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013, the so called Dublin III [7];

— The Regulation 2725/2000, the so called EURODAC valid until 20 July 2015 when the amended Regulation (EU) 603/2013, was repealed on 11 December 2018 by Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011[8].

Besides the above regulations several directives were included in the creation of the Dublin System:

— the so called Asylum Procedure Directive (Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection — recast) [9];

— the revised Reception Conditions Directive (Directive 12013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection) [10];

— the revised Qualification Directive (Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted — recast) [11].

This legal regulation will not be further analysed in this paper because of its more specific purpose but the latest amendment proposals of the Commission will be noted.

The Dublin system establishes the principle that only one Member State is responsible for examining an asylum application. The objective is to avoid asylum seekers from being sent from one country to another, and also to prevent abuse of the system by the submission of several applications for asylum by one person. The criteria for establishing responsibility range, in hierarchical order, from family considerations to a recent possession of visa or residence permit in a Member State, and to whether the applicant has entered the EU irregularly or regularly.

All EU Member States apply the Dublin Regulation and its amendment, as do the countries of the European Free Trade Association (EFTA), outside of the European Union, i. e. Norway, Iceland, Switzerland and Liechtenstein.

The United Kingdom and Ireland are bound by Regulation 604/2013, following a notification of their wish to take part in the adoption and application of that Regulation based on Protocol 21 to the Treaties. The position of these Member States with regard to any amendment to this Regulation is defined by Protocol 21. Denmark applies the Dublin Regulation on the basis of an international agreement [12]. It shall, in accordance with Article 3 of that agreement, notify the Commission of its decision whether or not it would implement the contents of an amended regulation.

The now acting Dublin system contains procedures for the protection of asylum applicants, aimed at improving the system's efficiency through:

— An early warning, preparedness and crisis management mechanism, geared towards addressing the root dysfunctional causes of national asylum systems or problems stemming from particular pressure.

— A series of provisions on the protection of asylum applicants, such as a compulsory personal interview, guarantees for minors (including a detailed description of the factors underlying the assessment of a child's best interest) and extended possibilities of reunifying them with relatives.

— The possibility for appeals to suspend the execution of the transfer for the period when the appeal is judged, together with the guarantee of the right for a person to remain on the territory pending the decision of a court on the suspension of the transfer pending the appeal.

— An obligation to ensure legal assistance free of charge upon request.

— A single ground for detention in case of risk of absconding; strict limitation of the duration of detention.

— The possibility for asylum-seekers who could in some cases be considered irregular migrants and returned under the Return Directive to be treated under the Dublin procedure — thus giving these persons more protection than the Return Directive.

— An obligation to guarantee the right to appeal against a transfer decision.

— More legal clarity of procedures between Member States — e. g. exhaustive and clearer deadlines. The entire Dublin procedure cannot last longer than 11 months to take charge of a person, or 9 months to take him/her back (except for absconding or where the person is imprisoned).

3. REVISION PROPOSALS TO THE DUBLIN SYSTEM –TOWARD DUBLIN IV?

On 4 May 2016, the Commission proposed its legislative initiative to reform the Dublin system. On 6 April, the Commission put forward two possible options: one consists in creating a corrective mechanism involving a relocation option in the event of massive influxes into Member States. The second option is more far-reaching and is less appreciated by the Member States: recasting the Dublin system on the basis of quotas distributed between the Member States and calculated on criteria such as the size of population and GDP and therefore renouncing the so-called first country of entry principle.

Slovakia and Hungary were the first to declare their objections to the relocation policies for asylum seekers based on per country quotas. The resolution of the migration's problem was among the priorities in the programme of the Slovak presidency of the EU. In Hungary on 2 October 2016 a referendum on migrant quotas was conducted [13].

At the end of 2015, both Hungary and Slovakia submitted a complaint to the European Court of Justice against the asylum-seekers relocation policy. In principle, the Treaty formally demands that Hungary apply these decisions adopted last September 2015 by qualified majority voting. The Court of Justice of the European Union dismissed the action brought by Slovakia and Hungary against the provisional mechanism for mandatory relocation of asylum-seekers on 6 September 2017 [14].

Slovakia and the other three countries of the Visegrad group (Poland, the Czech Republic and Hungary) are to make proposals to their European colleagues to try to reach a compromise on the issue of quotas for the relocation of asylum seekers and on the future reform of the Dublin system [15].

The quota principle is accused of putting disproportionate pressure on countries such as Greece. The general idea contained in the reform is also to relieve countries such as Germany and Sweden, which are attracting a significant number of asylum seekers.

Two months after having presented its reform of the so-called Dublin system the European Commission made another proposal on 13 July 2016. This focuses particularly on shortening the procedures, new responsibilities for asylum seekers, including penalties, as well as fast tracking labour market access in Member States.

With regard to the European asylum regime, which was seriously put to the test in 2015, the Commission seeks to bring standards closer together in Member States and rectify the divergences in the reception, care and rights of asylum seekers. By taking measures, including sanctions, in an effort to stem secondary flows of asylum seekers, the Commission is also seeking to prevent "asylum shopping" and avoid asylum seekers being tempted to get into countries that appear the most attractive. Currently, Germany and Sweden are by far the countries attracting most asylum candidates.

The Commission proposed to replace the directive on asylum seekers with regulation introducing a common procedure for harmonised international protection at an EU level and harmonisation in this area with the length of time granted for residency permits awarded to beneficiaries of international protection.

The status of refugees may also be revised on the basis of the situation in the country of origin. In this connection, Member States will be obliged to take into account the indications provided by the European Asylum Seekers Office (EASO). Protection will be granted to an individual only for the time required. The proposal also introduces stricter rules for deterring secondary movements. The five-year waiting time imposed on beneficiaries of international protection where they can obtain the status of long-term resident will also be extended each time the person concerned is identified in a Member State where they do not have leave to remain or reside. The access to certain social benefits will also depend on the efforts made by the asylum seeker to integrate.

The Commission also proposed to enable the national authorities to assign asylum seekers an obligation of residency. The Commission confirmed that it would be possible for Member States to place asylum seekers in detention

if there is a risk of them absconding. This possibility should only be applied to exceptional situations and as a last resort. This revision also insists on the fact that reception conditions will only be provided in the Member State responsible for examining the asylum application.

This idea seeks to reduce differences between Member States regarding the rates of recognising the rights to asylum, discourage secondary movements of asylum seekers and provide effective common procedural guarantees for asylum seekers.

The Commission is particularly keen that Member States can make decisions on asylum within a maximum timeframe of six months, with a two month maximum when the demand for asylum is deemed unfounded or when fast tracking is applied (for so-called safe countries of origin, for example). It also sets out deadlines for appeal: rejected asylum seekers will now have from one week to a maximum of one month to submit an appeal in the event of their demand being refused. Decisions on first appeal will not be able to supersede a maximum of six months.

Together with these strict conditions, the Commission is proposing that asylum candidates can benefit throughout the EU from a right to a personalised interview and free legal representation as soon as the administrative procedures are ongoing. A legal adviser will also be allocated to non-accompanied minors and other vulnerable people five days after they have submitted their demand for asylum, at the latest.

With these renewed guarantees, the Commission is seeking to introduce sanctions for asylum seekers who do not respect their obligations throughout the EU. This approach has been strongly criticised by the Greens/EFA [16] group of the European Parliament in a press release, which denounced the "regressive proposals" on asylum seekers' rights [17].

The proposal introduces new obligations on cooperation with the authorities and sanctions in the event of them not being respected. It plans on replacing the lists of so-called safe countries of origin (which justify, for example, fast track procedures in the processing of dossiers) with a single European list. This kind of proposal was put on the table in September 2015 and the EP worked towards developing a position on it by the end of July 2016.

On the same date when the Commission announced its new reform's proposals of the Dublin system, data on the relocations of the asylum seekers from Greece and Italy were presented. From 106.000 persons 3.056 people have been relocated: 2.213 of them from Greece and 834 from Italy. The Commission recognizes that the current situation is far from the target of relocating 6.000 people per month.

In its fifth progress report on the resettlement, the Commission presents the following data: 8208 people have been resettled from non-EU countries out of the 22,504 places promised in July 2015. The majority of the resettled refugees came from Turkey, Lebanon and Jordan. They were taken in by 20 resettling countries (Germany, Austria, Belgium, Denmark, Spain, Finland, France, Ireland, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Norway, Netherlands, Portugal, Czech Republic, United Kingdom, Sweden and Switzerland [18].

The Czech Republic should have relocated 2,691 refugees from Greece and Italy. It relocated 12. Hungary should have accepted 1,294 people but allowed none in. Poland was to take in 7,082 refugees and hasn't accepted any. Slovakia was supposed to relocate 902 asylum seekers. But it relocated 16 people — all single mothers with children [19].

4. THE LEGISLATIVE PROCESS

The Commission proposal for recast the Dublin III Regulation was assigned to the Civil Liberties, Justice and Home Affairs Committee (LIBE), with Cecilia Wikström (Sweden) appointed as rapporteur. The Committee on Foreign Affairs (AFET) and on budgets (BUDG) adopted opinions on 4 May 2017 and 17 May 2017 respectively.

On 6 November 2017, the European Parliament confirmed a mandate for interinstitutional negotiations with the Council on the basis of the report adopted by the LIBE committee on 19 October. The main suggestions for a new Dublin Regulation are:

— Asylum-seekers who have a "genuine link" with a particular member State should be transferred to it — the first relocation criteria;

— Asylum-seekers that have no genuine link with a particular member State will automatically be assigned to a Member State according to a distribution key; that Member State will then be responsible for processing the asylum application;

— Asylum-seekers would be able to chose among four countries which at that given moment have received the fewest asylum-seekers according to a distribution key;

— Countries of first arrival must register all asylum-seekers, and check their fingerprints as well as the likelihood of an applicant being eligible for international protection;

— Applications from applicants with a very small chance of receiving international protection would be examined in the country of arrival;

— Individual guarantees for minor asylum applicants, and an assessment of their best interest are a priority;

— Faster family procedures should be introduced under which asylum-seekers are immediately transferred to a country in which they claim to have family; furthermore, applications for international protection of a family should be processed together, without prejudice to the right of an applicant to lodge an application individually;

— A clear system of incentives and disincentives should be introduced for asylum applicants to avoid absconding and secondary movements. Furthermore, the meaning of absconding needs to be clearly defined;

— Frontline Member States that fail to register applicants would see relocation from their territory stop, while Member States refusing to accept relocation of applicants would face limits on their access to EU funds.

The discussion in the Council between the member States have continued for more than two years. The most controversial aspect in the reform of the Dublin Regulation is the solidarity mechanism and its balance with responsibility.

The Bulgarian Presidency of the Council planed to reach a general approach in the Council by June 2018. The main elements for the balance between responsibility and solidarity were presented in May 2018 as a compromise proposal, which was afterwards submitted to the JHA Council for debate.

At the European Council of June 2018, in October 2018 and in December 2018, however, EU leaders failed to achieve a breakthrough on internal aspects of migration and the EU's asylum policy, showing remaining differences among Member States as regards, in particular, the reform of the Dublin Regulation.

5. THE BULGARIAN LEGISLATION

The legislative treatment of refugees and persons seeking asylum was considerably changed by the Law on Asylum and Refugees (LAR) (promulgated SG No. 54/31. 05. 2002, effective as of 30. 11. 2002). It repealed the Law on Refugees (promulgated SG, No. 53/11. 06. 1999, supplemented No. 97/1999, amended No. 45/30. 04. 2002) thus illustrating the dynamic changes in the field.

The Law on Asylum and Refugees specifies the conditions and the procedure for granting protection to foreigners on the territory of the Republic of Bulgaria as well as their rights and obligations. The law introduces the general category of "protection of foreigners on the territory of the Republic of Bulgaria".

It encompasses asylum, international protection and temporary protection (Art. 1, para 2 of LAR). On its part, "international protection" has been defined in Art. 1a (New — SG, No. 80/2015, effective as of 16. 10. 2015).

The international protection is provided on the grounds of the Convention Relating to the Status of Refugees adopted in Geneva on 28 July 1951, the Protocol Relating to the Status of Refugees of 1967 [20], on international legislation referring to human rights protection and on the LAR, which define the status of a refugee and humanitarian status.

Thus, as Veselin Tzankov points out, "a successful attempt was made to incorporate different types of protection in one regulation act, the so called "special protection"[21]. Currently, the "special protection" category encompasses the following institutes according to the Bulgarian legislation: asylum, refugee status; humanitarian status; temporary protection.

The Bulgarian legislator, therefore, makes a strict distinction between the categories of persons seeking protection and foreigners with residence visas where the substantive and procedural grounds have been laid down in the Foreigners in the Republic of Bulgaria Act (FRBA). It relates to cases of migration due to economic, family, medical, educational, and other reasons. Foreigners in the Republic of Bulgaria Act explicitly states in Art. 7 (Amended — SG, No. 54/2002, effective as of 01. 12. 2002; amended — SG, No. 23/2013; amended — SG, No. 80/2015, effective as of 16. 10. 2015): *"The status of foreigners, seeking or having received protection, shall be governed by a special statute"*. Protection, within the meaning of LAR, is therefore a special type of residence with respect to FRBA. This specificity is also explained by the grounds for providing such a protection — the well-founded fear of persecution. This is why the procedure for obtaining the respective status of protection is also different from the legal arrangement in the FRBA. Veselin Tzankov has a good reason to define the relationship between FRBA and LAR as one of a general law to a special law [22].

Although it arranges four different institutes of protection, the LAR contains some provisions common for them all. In the first place, it stipulates that any foreigner may apply for protection in the Republic of Bulgaria if he/she complies with the LAR provisions (Art. 4, para. 1 of LAR). The second common norm is the principle that the claim for granting protection shall be made personally and voluntarily. (Art. 4, para. 2 of LAR). The third place is taken by the clause of non-refoulement: a foreigner who has entered the Republic of Bulgaria to seek protection or who has been granted protection may not be returned to the territory of a country where his life or freedom is threatened for reasons of race, religion, nationality, specific social group affiliation or political opinion or where he faces a threat

of torture or other forms of cruel, inhuman or degrading treatment or punishment (Art. 4, para. 3 — amended — SG, No. 80/2015, in force from 16. 10. 2015). Art. 4, para. 2 LAR provides for the exceptions from the non-refoulement clause: the rights it guarantees cannot be claimed by a foreigner who has been granted protection whom there are grounds for regarding as a danger to national security, or who, having been already convicted of a serious crime by a judgment that has come into effect, constitutes a threat to the community.

The comparison to Art. 33 of the Convention Relating to the Status of Refugees shows that the provision of Art. 4, para. 3 is larger than that of Art. 33, para 1, where the grounds of "a threat of torture or other forms of cruel, inhuman or degrading treatment or punishment" are not given. The provision of Art. 4 of the same text literally reproduces Art. 33, para. 2.

Article 33 Prohibition of expulsion or return (refoulement)

Para. 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Para. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country [23].

As regards persons, the LAR field of application is specified by the provision § 1, item 1 in the Additional Provisions: *"A foreigner" shall mean any person who is not a Bulgarian citizen, nor a citizen of any other European Union Member-State, nor a citizen of any country-signatory to the Agreement creating the European Economic Area, nor a citizen of the Swiss Confederation, nor is a person who is not a citizen of any country as per that country's legislation".*

Another important provision is the legal definition of "a foreigner seeking protection" in § 1, item 2 in the Additional Provisions of LAR (amended — SG, No. 80/2015, in force from 16. 10. 2015): *"A foreigner seeking protection" shall mean an individual who has expressed his/her desire to be granted protection under this Law until the completion of his/her application proceedings".*

Another common principle feature charactersing the status of those seeking special protection, which puts them in the category of a more privileged group of foreigners, is the irrelevancy of their mode of entry into the territory of Bulgaria. No matter whether they have made a legal or illegal entry,

they shall, within reasonable time (from a few hours up to a few days following their entry into the country), by their free will clearly express their desire (in writing, speech, or any other due manner) to be granted the corresponding type of special protection in order to enable the authorities start the procedure.

6. CONCLUSION

The migration crisis in Europe revealed weaknesses in the Dublin system as a whole. The main problem of the Dublin system at present is that it is not functioning. The migrants refuse to make asylum applications or comply with identification obligations in the Member State of first arrival, and then move on to the Member State where they wish to settle and apply for asylum there. In this way the so-called secondary movements have resulted in many asylum applications being made in Member States which are not those of the first point of entry. This in turn compelled several Member States to reintroduce internal border controls to manage the influx.

Problems include difficulties in obtaining and agreeing on evidence proving a Member State's responsibility for examining the asylum application, leading therefore to an increase in the number of rejections of requests to accept the transfer of applicants. Even where Member States accept transfer requests, only about a quarter of such cases result in effective transfers, and, after completion of a transfer, there are frequent cases of secondary movements back to the transferring Member State. The effectiveness of the system is further undermined by the current rules which provide for a shift of responsibility between Member States after a given time. So, if an applicant absconds for long enough in a Member State without being effectively transferred, this Member State will eventually become responsible.

A further impediment to the effective functioning of the Dublin system results from the difficulty in transferring applicants to Member States with systemic flaws in critical aspects of their asylum procedures or reception conditions. The effective suspension of Dublin transfers to Greece since 2011 has proved a particularly critical weakness in the system, in particular given the large number of migrants arriving in Greece. There are divergences in the reception conditions and duration of asylum procedures among the Member States, which is also the reason for secondary movements.

The last novelty in the Common European Asylum System is the broadening of the competences of eu-LISA — the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice [24].

It was established by Regulation (EU) No 1077/ 2011 of the European Parliament and of the Council [25] in order to ensure the operational management of SIS, the VIS and Eurodac and of certain aspects of their communication infrastructures and potentially that of other large- scale IT systems in the area of freedom, security and justice, subject to the adoption of separate Union legal acts. Regulation (EU) No 1077/2011 was amended by Regulation (EU) No 603/2013 in order to reflect the changes introduced to Eurodac.

According to Art 5 of the Regulation 2018/1726 the Agency shall perform: the tasks conferred on it by Regulation (EU) No 603/2013; and tasks relating to training on the technical use of Eurodac (the Eurodac regulation is repealed).

At the present stage the proposals for amendment of the Dublin system do not allow a serious prognosis regarding the future regulation. In order to make a well-grounded forecast we need a serious comparative legal study of the national asylum systems, as well as a sociological analysis of the Member States' visions on asylum policies.

The large number of omissions and gaps can hardly be supplanted with classic legal regulation. We need a complex and multifaceted approach, which should involve a different kind of compensatory measures.

The question regarding the development of the process for the common European asylum system remains open.

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