



REMEDIES ACCEPTED BY THE EUROPEAN COMMISSION FACTS AND TENSIONS

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Types of remedies

Antitrust remedies

- Regulation 1/2003, Art. 7 foresees that behavioural or structural remedies can be imposed:

*“[...The Commission] may impose [...] any **behavioural or structural remedies** which are **proportionate to the infringement** committed and **necessary to bring the infringement effectively to an end**. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy[...].”*

Recital 12: “[...] Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.”

- Art. 9 does not contain comparable provisions. Requirements of effectiveness and proportionality still apply.

Types of remedies

Merger remedies

- Remedies Notice sets out a preference for structural remedies (and against behavioural remedies) in merger cases:

Para.12: “[...] the basic aim of commitments is to **ensure competitive market structures**. Accordingly, **commitments which are structural in nature**, such as the commitment to sell a business unit, **are, as a rule, preferable** from the point of view of the Merger Regulation’s objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures [...].

Para.17: “[...] Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances [...]”

- The Remedies Notice notes different types of remedies:
 - **Divestiture of a business to a suitable purchaser**
 - **Removal of links with competitors**
 - **Other remedies**
 - *Access Remedies*
 - *Change of long-term exclusive contracts*
 - *Other non-divestiture remedies*

Access remedies

Access remedies can take many forms

- Neither clear-cut structural nor behavioural type of remedies:
 - Remedies Notice refers to access remedies as “other remedies” but refers to the granting of access to key infrastructure as a structural remedy
 - Sometimes in the literature considered as behavioural or “quasi-structural”
 - Access to infrastructure, e.g.:
 - Airport slots
 - Mobile networks
 - Energy infrastructure (gas, electricity)
 - Access to intellectual property, e.g.:
 - Copyrighted data
 - Patents
 - Hardware / software interoperability information (e.g., semiconductors; high-end video conferencing)
- Access remedies are capable of achieving a structural effect
- But, a structural effect is not guaranteed, e.g., if there is no third party requesting access

The EC's remedies practice

Pool of cases reviewed

Our review covers merger and Art. 9 remedies cases of 2005-2018:

Mergers	Phase I	Phase II	Total
Nov 2004 - Jan 2010	78	21	99
Feb 2010 - Oct 2014	50	15	65
Nov 2014 - Dec 2018	67	22	89
Total	195	58	253

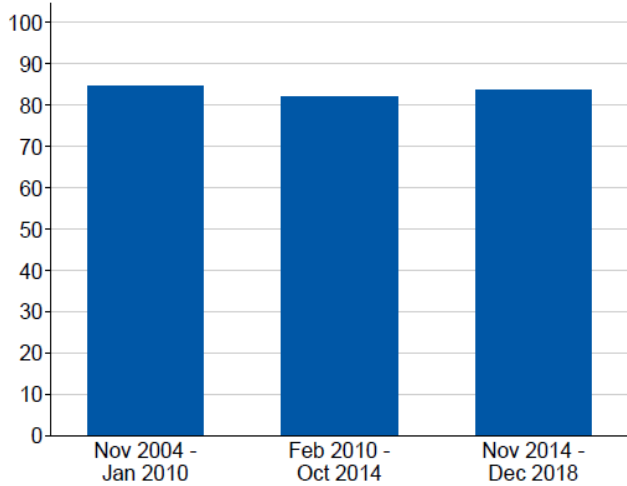
Art. 9	Art. 101	Art. 102	Total
Nov 2004 - Jan 2010	5	8	13
Feb 2010 - Oct 2014	7	11	18
Nov 2014 - Dec 2018	2	4	6
Total	14	23	37

The EC's remedies practice

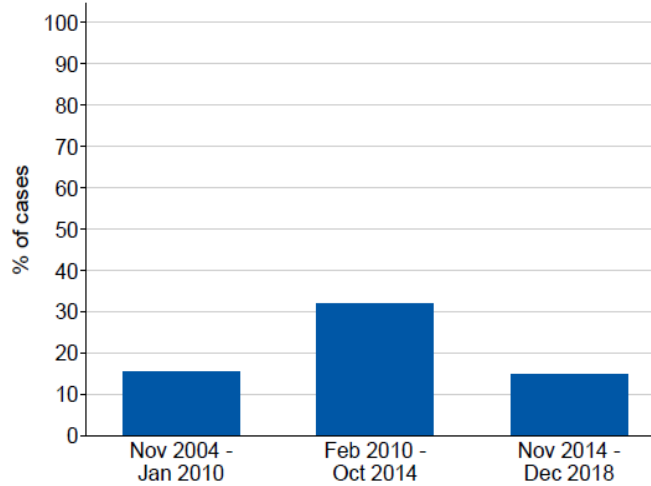
Types of remedies in merger remedies packages

Phase I

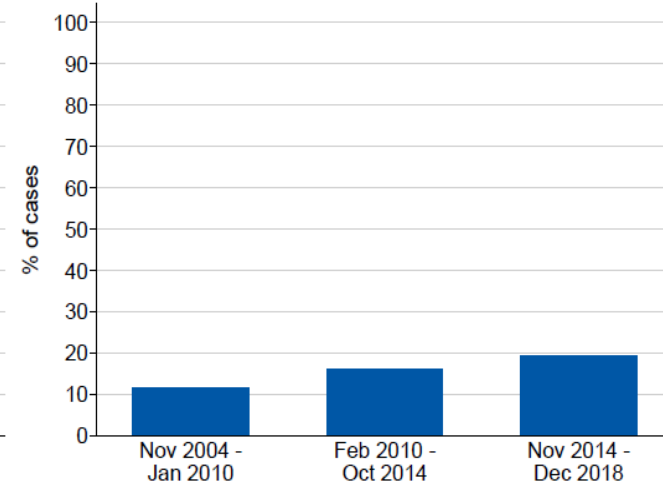
Structural



Access

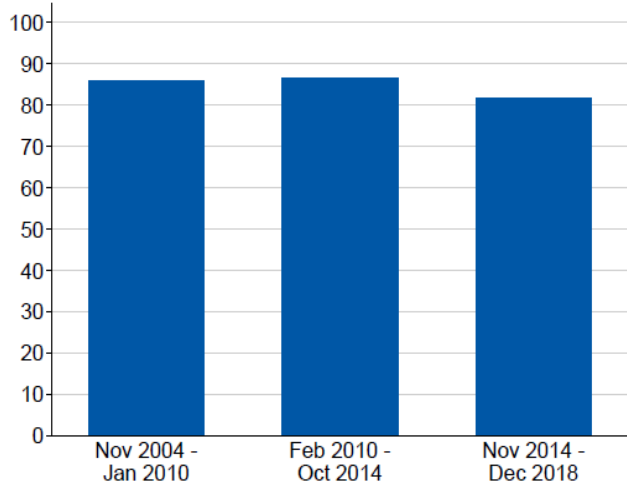


Behavioural

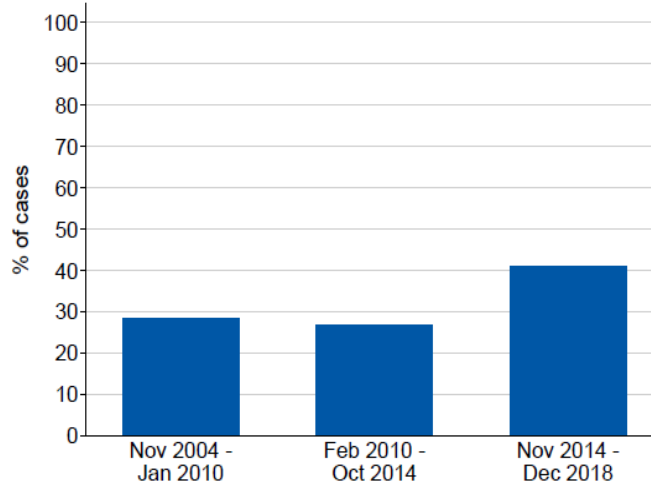


Phase II

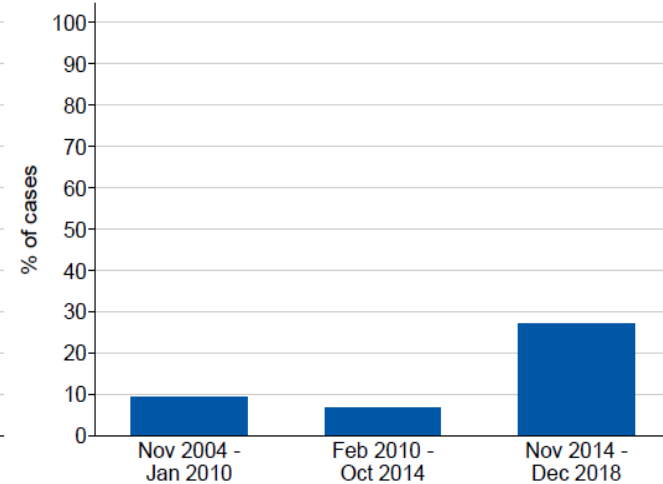
Structural



Access



Behavioural

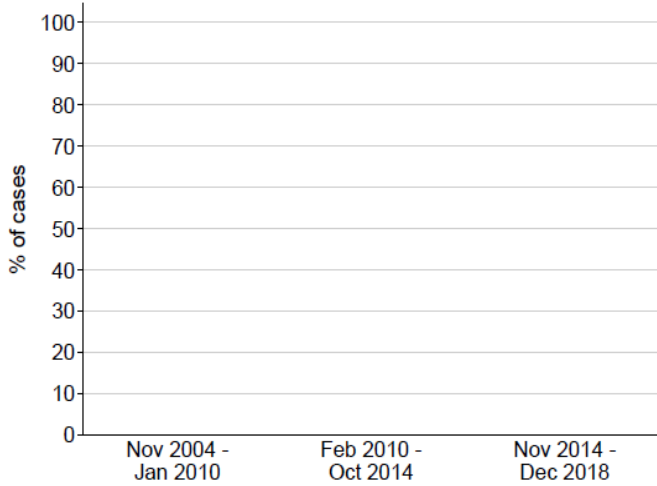


The EC's remedies practice

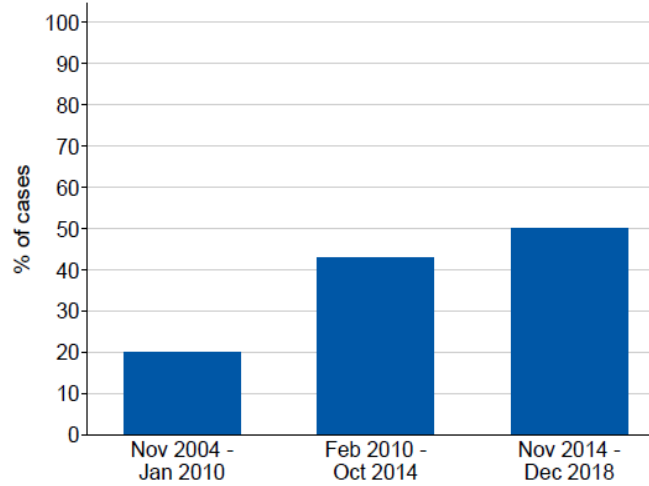
Types of remedies in Art. 9 remedies packages

Art. 101

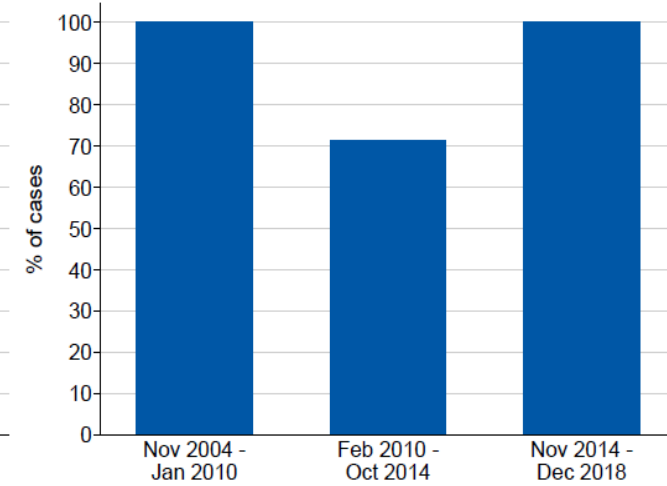
Structural



Access

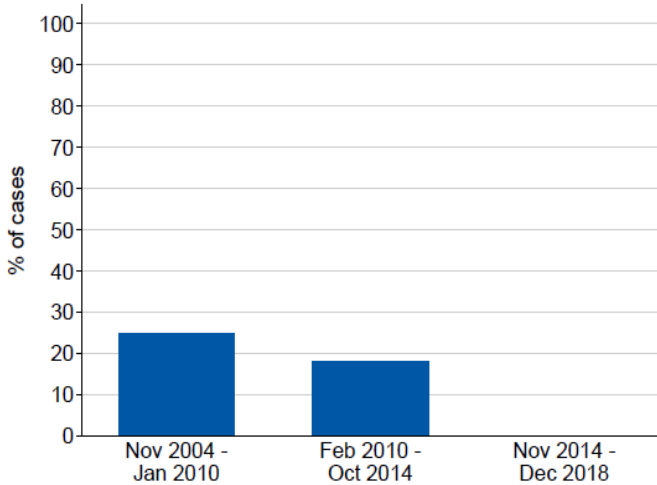


Behavioural

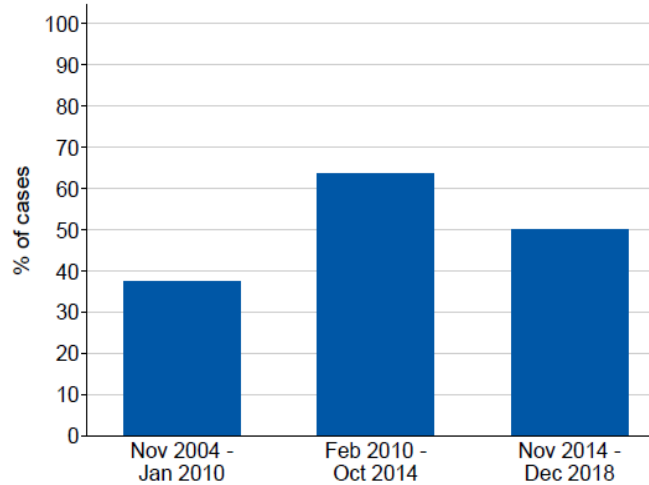


Art. 102

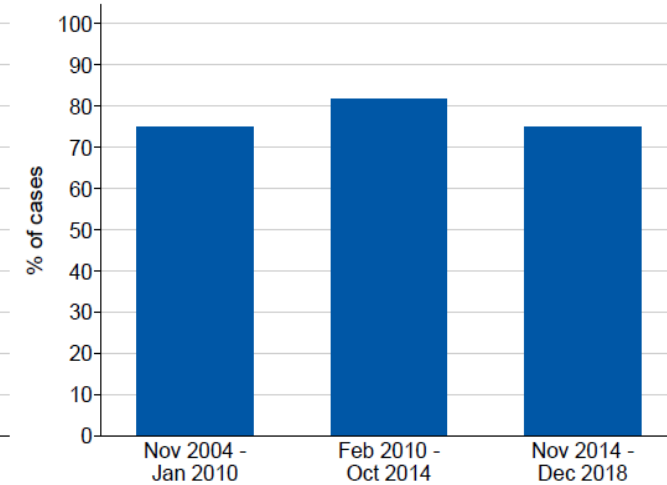
Structural



Access



Behavioural

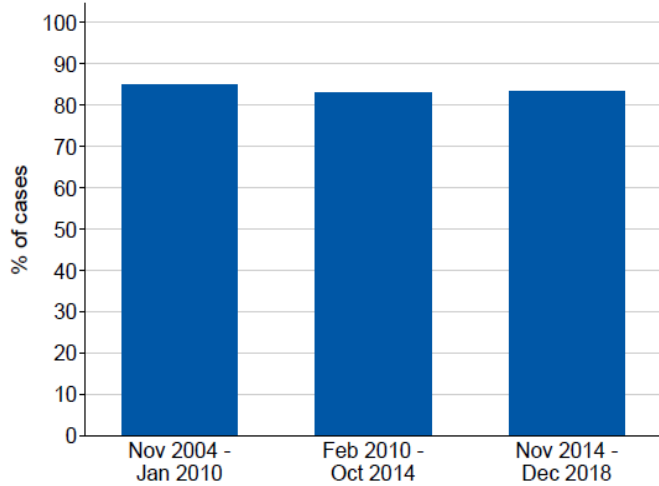


The EC's remedies practice

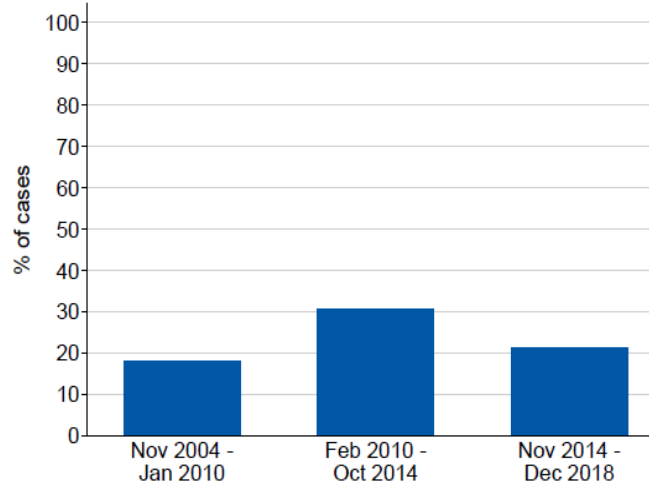
Types of remedies contained in remedies packages

Mergers

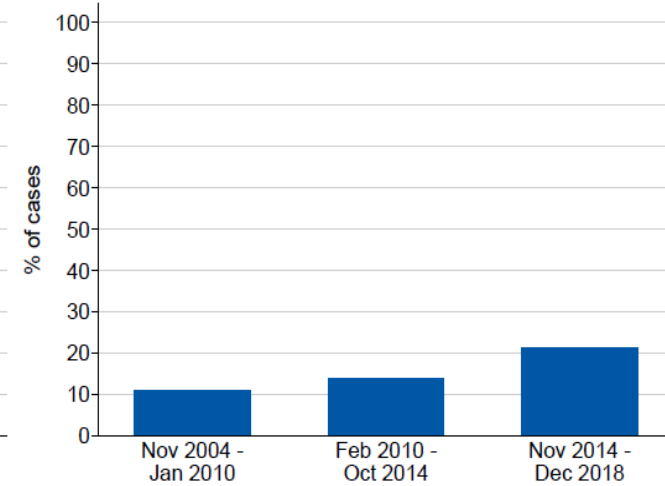
Structural



Access

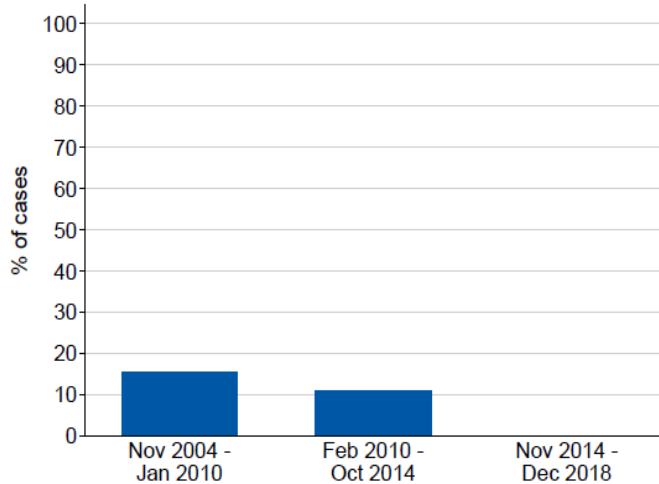


Behavioural

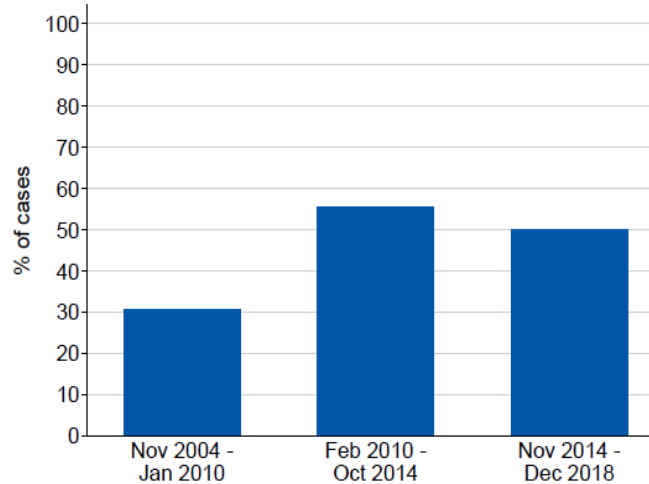


Art. 9

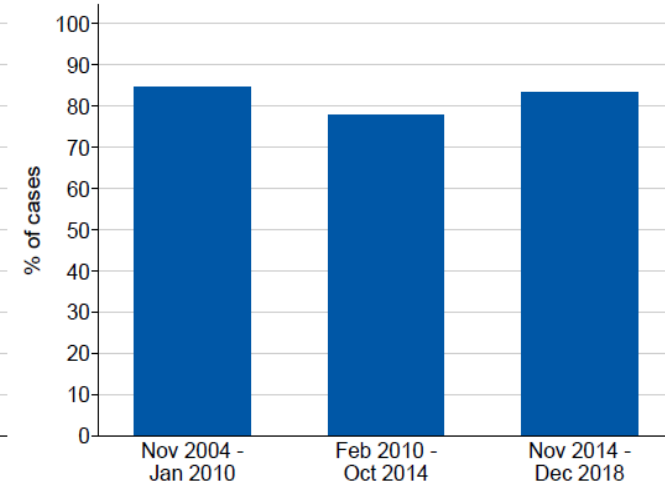
Structural



Access



Behavioural



Tensions

- If behavioural remedies are “as effective” as structural remedies in Article 101/ Article 102 cases, why not use them more widely in merger cases?
- If structural remedies are “more effective” than behavioural remedies in merger cases, why not use them more widely in Article 101/ Article 102 cases?
- Can access remedies be “as effective” as a divestment if no third party requests access under the terms offered?

Relevant publications

Maier-Rigaud, Frank P. (2016) Behavioural versus Structural Remedies in EU Competition Law, in: Lowe, Philip, Marquis, Mel and Monti, Giorgio (eds.), *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law*, Hart Publishing. Available at SSRN: <https://ssrn.com/abstract=2457594>.

Hoehn, Thomas and Lewis, Alex (2013) Interoperability remedies, FRAND licensing and innovation: a review of recent case law, *European Competition Law Review*, 34(2).

Maier-Rigaud, Frank P. (2012) The Idea of the Subsidiarity of Structural Remedies in European Competition Law, *Wirtschaft und Wettbewerb*, Vol. 5, pp.485-500. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906335

Hoehn, Thomas (2010) Structure versus conduct - a comparison of the national merger remedies practice in seven European countries, *International Journal of the Economics of Business*, Vol.17, ISSN:1357-1516.

Maier-Rigaud, Frank P., Hellström, Per and Wenzel Bulst, Friedrich (2009) Remedies in European Antitrust Law, *Antitrust Law Journal*, Vol. 76, pp. 43-63. Available at SSRN: <https://ssrn.com/abstract=1830110>

Hoehn, Thomas, Rab, Suzanne and Sagers, Grant (2009) Retail Therapy: A Cross-Country Comparison of Merger Control Remedies Practice and Experience in the Wholesaling and Retailing Sectors of France, Germany, Italy, the Netherlands, Spain and the United Kingdom, *European Competition Law Review*, 30(4).

Hoehn, Thomas, Rab, Suzanne and Sagers, Grant (2009) 'Breaking up is hard to do': National merger remedies in the information and communication industries, *European Competition Law Review*, 30(5).

Maier-Rigaud, Frank P. and Lowe, Philip (2008) Quo Vadis Antitrust Remedies. *2007 Fordham Competition Law Institute*, Chapter 20, pp. 597-611. Available at SSRN: <https://ssrn.com/abstract=1827669>.

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