

PROTECTING CONSUMER RIGHTS IN ELECTRONIC CONTRACTS : A LESSONS FROM EUROPEAN UNION AND UNITED KINGDOM

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Abstract - The nature and development of e-commerce cause many changes to the traditional legal conceptions. It has made a significant impact on the traditional role of the consumer as well. As a result, the modern consumer is no longer limited to the offline market but, in contrast, he is more explorative in electronic market platforms. On the one hand, these emerging changes facilitate the sophisticated lifestyle of the consumer. But, on the other hand, it is evident that online consumers are exposing more vulnerabilities in the electronic environment other than the offline consumers. Information disclosure, privacy, lack of system security and dispute resolution are some of the key challenging issues which online consumers have to deal with today. Accordingly, these issues have been addressed in both international and domestic legal systems. Amid, European Union and United Kingdom examples provide more advance mechanisms for protecting consumer rights in electronic contracts. However, in Sri Lankan context, the Consumer Affairs Authority Act or Electronic Transaction Act or any other legislation do not provide any specific protection against the violations of consumer rights in an electronic environment. Therefore, this paper aims to investigate the developments in the European Union and the United Kingdom legal system in the light of online consumer rights protection. Moreover, the findings will be compared with domestic legislative provisions in order to emphasize the lacuna in Sri Lankan consumer law as well as the information technology law regimes. The qualitative research approach used as the main research paradigm of the research.

Keywords - Consumer Rights, Electronic Contracts, European Union, United Kingdom

I. INTRODUCTION

“Consumer Protection is not only important to parties in normal transactions but is also vital to electronic commerce” (Kavir, 2011,p.96)

As Kavir correctly opines, the development of the internet has expanded the traditional scope of consumer protection in various ways. Admittedly, electronic commerce modifies the way of transactions in traditional consumers. Therefore, today, a consumer can access goods and services by clicking on a single button of his computer. However, as Prins (2003) correctly argues even though the internet has improved the transparency of prices and brand selection, consumers are more vulnerable to receive less quality product and services. Therefore, it is necessary to safeguard consumer rights in electronic contracts in order to enhance the consumer trust in e-commerce (O’Hara, 2005).

Consequently, for the first time in 1962, the former United States President John F. Kennedy in his Congressional Statement declared that four basic consumer rights namely, right to safety, right to be informed, right to choose and right to be heard (Larsen & Lawson,2013). After that, many more rights were added such as the right to redress, right to consumer education, right to a healthy environment and etc. Accordingly, the United Nations Guidelines on Consumer Protection (UNGCP) has incorporated all these rights into single legislation and it defines the consumer as “natural person regardless of nationality, acting primarily for personal, family or household purposes”.

Notably, the European Union(EU) and the United Kingdom (UK) approaches on protecting consumer rights in electronic contracts are significant for many reasons. The Consumer Right Directive (CRD) is the recent development of the EU law, which was enacted in 2011 and replaced in 2014. Information requirement, an extension of cooling off period, contract of digital content are some of the attractive features of the CRD which directly cause to safeguard the online consumer rights (Sullivan, 2016; Mc Clafferty,2012). As well, the Consumer

Rights Act (CRA) of the UK jurisdiction contains some significant provisions which can be facilitated consumer contracts in an electronic environment.

However, the contentious issue is that, the Electronic Transaction Act, No, 19 of 2006 (the ETA), the Consumer Affairs Authority Act (the CAAA) or any other legislation in Sri Lanka, do not address any specific issues faced by online consumers. The ETA was enacted to facilitate the formation of the contract, the creation and exchange of data messages, electronic documents and other communications in electronic form in Sri Lanka. Even though the ETA is a progressive initiative of Sri Lankan ICT law, it does not contain any provisions relating to online consumer protection. As Kariyawasam (2008) clearly argues, "the ETA is silent about online consumer protection in relation to, for example, information disclosure, delivery, transaction confirmation, cancellation and refund policy" (p.56).

Section 10 of the Computer Crime Act No, 24 of 2007 (the CCA) recognizes unauthorized disclosure of information as a computer crime. This provision affords some basic protection for online privacy issues. However, as Fernando (2013) opines, still there is a gap in Sri Lankan data protection law. Moreover, it can be argued that, though the CCA provides protection for unauthorized information disclosure in online transactions, that single provision cannot address the other complicated issues faced by online consumers, such as payment security, online fraud, dispute settlement and etc.

Furthermore, when examining the consumer protection law in Sri Lanka, the CAAA provides general protection for consumers and traders by establishing the Consumer Affairs Authority to promote effective competition and regulate internal trade. Nevertheless, as well as the aforementioned electronic transaction legislations in Sri Lanka, the CAAA is also failed to provide a mechanism for online consumer issues. Weragoda (2017) criticised that, CPAA is not adequate as a dispute resolution mechanism in the current digital era.

Therefore, this research attempt to investigate the developments of EU and UK jurisdictions in relating to consumer right protection in electronic contracts. Furthermore, the findings will compare with Sri Lankan legislative provisions and critically analyze the existing gap in Sri Lankan law.

II. METHODOLOGY

This research is primarily based on the qualitative research approach. The main reason for selecting the qualitative approach is the critical and analytical nature of the research. Moreover, this research is a comparative study. EU and UK jurisdiction have been examined in order to investigate the new developments of online consumer protection mechanisms. As a normative research, both primary and secondary data were used in comparative analysis as well. The researcher has used International guidelines, EU Directives, Consumer protection and Electronic transaction legislations in selected countries and Sri Lanka as Primary Sources. Moreover, , textbooks, journal articles, research papers and statistical reports were extensively referred to as secondary sources.

III. RESULTS AND DISCUSSION

A. Benefits and Risks in Online Context

"The digital world has made individuals(consumers) both stronger and weaker. They are stronger as a result of features such as self-organization, self-help, and social interaction. However, in terms of threats to privacy, payment and concerns about new marketing techniques, access to infrastructure, services, and content as well as uncertainty about jurisdictional rules, consumers have become weaker." (Prins,2003,p.144)

As Prins (2003) correctly points out in the above statement, online consumers are having both benefits as well as risks in the online world which cause to make them stronger and weaker. Waite (1999) also brings a similar view and opines that "internet could bring about a radical change in distance selling by providing instantaneous, low-cost links for marketing and payment between consumers and suppliers worldwide; that there are resultant risks as well as benefits."(p.132)

When examine the positive factors of the online transactions from the consumers perspective, it is evident that since last few decades consumers attraction on e-commerce and online transactions have increased rapidly due to its flexible nature. Looking and comparing goods and products are easier on the internet other than the offline market (Prins, 2003). Therefore, consumers have more opportunities for selection and easier to access the information. As well, Khan (2016) highlights that consumers can save their time by just clicking a button

on the internet from sitting in the home or workplace. Thus, some scholars argue that, online transaction and e-commerce have improved the ‘consumer sovereignty’ and they regarded it as a positive force for consumer empowerment (Edward,2003).

However, it is observed that, though online consumers are enjoying significant benefits in the online world, they have to face a considerable amount of risk and vulnerabilities as well during their transactions. So, it is important to point out some issues and challenges faced by online consumers.

- Information disclosure- The major criticism for the online consumer protection is the lack of information disclosure from the retailers and vendors. In the internet, consumers have to deal with unknown sellers and vendors. Most of the time some of the essential information like vendor’s identity, description of the product or service, cancellation return and warranty policies are not adequately disclosed to the consumers.
- Privacy – As Edwards (2003) points out the internet has posed the most serious threats to consumers privacy. Internet service providers collect, process and store vast amount of personal information of consumers like, names, addresses, marital, employment relationships and etc, which have enormous commercial value. As well, credit card information and other commercial and personal information might be misused by vendors and service providers.
- Lack of system security- The activities of the computer hackers are increasing recently and many software has been developed to make the task easy. Thus, online consumers are in great fear about stealing their credit card information, when they are engaging in an online transaction. Therefore, lack of cyber security mechanism is another challenge for online consumer protection.
- Dispute Resolution- When consumers are in a dispute with vendor or service providers it is more difficult to deal with it in an online context. Consumers cannot physically interact with vendors and when the two are in the different jurisdiction the situation becomes more difficult (Waite,1999). Therefore, searching for an appropriate dispute resolution mechanism is a major challenge and moreover, there are some other challenges such as applicable law, cost of litigations

and click-wrap terms and conditions (Liyanage, 2010). As Cortes (2010) argues, traditional courts are always not the best option for resolving online disputes, because lack of expertise and resources to deal with cross-border disputes.

B. International Legal Framework for Online Consumer Protection

The concept of online consumer protection also came into the global attention since 1999. The OECD has introduced separate guidelines for online consumer protection namely, the Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999. However, previous international instruments regarding e-commerce, like the UNCITRAL Model law and the Electronic Communication Convention do not pay adequate consideration for consumer protection issues (Rohendi,2015). United Nations Guidelines on Consumer Protection in 2016 is the most recent global attempt which addresses the consumer protection issues more broadly.

1) OECD Guidelines for Consumer Protection in the Context of Electronic Commerce: The OECD’s Committee on Consumer Policy aims to address a broad range of consumer issues and helps public authorities to enhance the development of effective consumer policies. This Committee has introduced the OECD Guidelines for Consumer Protection in the context of Electronic Commerce, 1999 in order to facilitate the consumer protection in B2C commercial transactions. As Alsagoff (2006) indicates, the OECD guidelines “act as a platform for its member countries to develop their national law in tandem with the international standards”(p.82).

In 2016, the OECD’s Committee on Consumer Policy revised the Guidelines and issued new OECD Recommendations for Consumer Protection in E-Commerce. The revised Recommendations include several sub-themes such as non-monetary transactions, digital content products, active consumers, privacy and security risks and product safety. As well, the Recommendations recognizes that “the need to address a number of consumer challenges related to information disclosure, misleading or unfair commercial practices, confirmation and payment, fraud and identity theft, and dispute resolution and redress” (OECD Recommendations, 2016)

Most importantly, as general principles, the Recommendations addresses the crucial issues faced by online consumers in a broad manner. Section A

recommends a transparent and effective protection for online consumers, as

“Consumers who participate in e-commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.”

When examine all the above important recommendations it is evident that, the OECD's Committee on Consumer Policy has paid a careful attention to cover up most of the challenges faced by online consumers such as information disclosure, privacy, dispute resolution and etc. In addition to that, the Committee provides implementations principles as the Part II of the Recommendations. Notably, this implementation mechanism suggests that, in order to achieve the purpose of this Recommendation, governments should, in co-operation with stakeholders, “review and, if necessary, adopt and adapt laws protecting consumers in e-commerce”

Therefore, it can be argued that, the OECD Recommendations for Consumer Protection in E-Commerce is a comprehensive guide for all the states to develop a new legal framework for online consumer protection.

2)United Nations Guidelines for Consumer Protection in 2015:The UNGCP is the most recent major international step, towards the consumer protection. As Yu and Galligan (2015) point out, UNGCP provides an advanced global standard on consumer protection, for the purpose of delivering justice to every individual consumer. This opinion is very much highlighted in the objectives of the UNGCP

Notably, the UNGCP provides some special attention to the consumer protection in an electronic environment. The Consumer International stresses this as a major achievement when compared to the 1985 Guidelines (Consumer International, n d). As it further emphasizes, the new Guidelines provide parity of treatment between online and offline consumers. Article 63 of the UNGCP states that,

“Member States should work towards enhancing consumer confidence in electronic commerce by the continued development of transparent and effective consumer protection policies, ensuring a level of protection that is not less than that afforded in other forms of commerce”.

Also, it further emphasizes that, the Member States should review existing consumer protection policies to accommodate the special features of electronic commerce and ensure that consumers and businesses are informed and aware of their rights and obligations in the digital marketplace.

Therefore, it can be argued that the UNGCP encourage the consumer justice in the electronic environment as same as the offline environment. So, the UNGCP can be considered as a more progressive international instrument which encourages member states to facilitate online consumer protection mechanism in domestic level.

C. European Union Approach to Online Consumer Protection

Among the all other regional mechanisms, the European Union approach to online consumer protection is significant. According to the Finocchiaro (2003), the main objective of the European e-commerce legislation is promoting e-commerce. Therefore, he argues that consumer protection in an electronic transaction is an indispensable factor from this economic objective.

The Consumer Right Directive (CRD) is the recent development of the EU law, which was enacted in 2011 and replaced in 2014. The CRD is considered as an umbrella legislation of repealing and replacing Distance Selling Directive, Doorstop Selling Directive, Unfair Terms in Contracts Directive and the Sale of Consumer Goods and Associated Guarantees (Sullivan, 2016; Mc Clafferty,2012; White, 2015).

1)Directive 2011/83/EU on Consumer Rights:

As Article 1 of the CRD indicates, the purpose of the Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market (Bezakova, 2013).

Article 5 and 6 of the CRD provides the information requirement for both contractss other than the distance and off-premises contracts and distance and off-premises contracts. Accordingly, before a consumer is bound by a contract, the trader should provide the relevant information such as the main characteristic of the goods, the identity of the trader, the geographical address, the price of the goods and etc. in a clear and comprehensive manner.

As Sullivan (2016) opines, the rationale for this information requirement is an attempt to address the inherent

information imbalance that exists between consumer and trader who has more knowledge of the market. Therefore, it can be argued that the information provisions of the CRD are a tool to enhance the consumer confidence in the internet market.

Notably, another new feature of the CRD is an extension of the cooling-off period of a distance contract from seven to fourteen days. Article 9 of the CRD states that, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs. As Sullivan (2016) comments, “this extended period from seven to fourteen days was to increase legal certainty and reduce compliance cost for businesses dealing cross broader” (p.75). In contrast, some scholars argue that consumers’ mandatory rights of withdrawal as unjustified from the seller’s point of view (White, 2015).

The most attractive feature of the CRD is its potential to cover contracts for the supply of digital contents. According to the Recital 19 of the Directive, “digital content means data which are produced and supplied in digital forms, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means” Moreover, Recital 19, in connection with Article 6 (1) (2), imposes additional information obligations and requirements on the e-tailers supplying digital content. In particular, these obligations include information on the functionality and the relevant interoperability of digital content (Bezakova, 2013). Therefore, it can be argued that this pre-requirement of information with regard to the digital content makes the consumer more knowledgeable about the goods and services.

However, as Article 16 (m) stipulates, the consumer will lose his right of withdrawal with regard to the supply of intangible digital contents. Therefore, however, McClafferty (2012) argues, “some clarification may be needed in determining the status of digital content not supplied on a tangible medium”. Bezakova (2013) also supports the McClafferty’s argument about digital content and opines that,

“Clarification of the definition of intangible digital content, as well as a clear stipulation of the conditions for the non-existence of the withdrawal right shall be, in respect to consumer protection, welcomed. To the contrary, imposing different treatment of tangible digital

content than intangible content apparently creates two, distinct levels of consumer protection” (p.188).

Nevertheless, it is noteworthy that, though some additions are needed, the initiative taken from the EU to extend the protection for digital contents can be considered as a milestone in e-consumer protection law.

D. United Kingdom

The online market in the UK is growing at a remarkable rate every second. As some internet statistics highlights, approximately 87% of U.K. consumers have bought at least one product online in the last 12 months, and the United Kingdom is second only to Norway for making e-commerce purchases in Europe (emarketer,2016). In total, UK e-commerce sales grew from £115 billion (\$175.74 billion) in 2015 to £133 billion (\$203.26 billion) in 2016 (emarketer,2016).

Though UK has announced its exit from the European Union many EU legislation has tremendously influenced on developing e-commerce legal framework in the UK. Accordingly, after the introduction of the CRD in EU law, UK parliament also required to incorporate CRD into domestic law. As a result of that, the UK introduced the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (the “Consumer Contracts Regulations”) as an interim mechanism and finally in 2015, Consumer Right Act (CRA) was introduced 1)The Consumer Rights Act - 2015: As El-Gendi (2017) opines, the CRA is the most significant piece of consumer right legislation in the decade with the aim of unifying previous legislation and establishing new rights for consumers. The CRA consolidated and repealed some previous key consumer legislations namely, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999. According to Giliker (2016), “prior to the Act, UK consumer law was unnecessarily complex, fragmented and, in places, unclear...”. Therefore, as many scholars point out, the CRA brings more clarity into the UK law. (Giliker, 2016)

Although the CRA is not a carbon copy of the CRD in EU law, the Government expressly stated that, “In developing proposals for the Consumer Rights Act 2015, the Government has taken into account the definitions and measures contained within the CRD and, as far as appropriate, has made the Act consistent with the CRD, with the intention of achieving overall a

simple, coherent framework of consumer legislation.” (Explanatory Note, CRA)

Therefore it is noteworthy that, the CRA has some positive influence from the CRD in order to regulate the high level of consumer protection including both offline as well as online consumers.

According to the preamble of the CRA, the main objective of the Act is to amend the law relating to the rights of consumers and protection of their interests; to make provision about investigatory powers for enforcing the regulation of traders..and etc. The Act defines the term ‘consumer’ as, “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”. This definition provides broader coverage of consumers. El-Gendi (2017) also supports this argument and states that “the Act has broadened the scope and lessened the criteria of who shall be deemed a consumer. This ensures that more people can receive the protection of the many provisions of this Act”(p.84).

Part I of the CRA applies where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services if the agreement is a contract. The most attractive provision of Part I of the CRA is, its applicability of the contract relating to the digital content. The Act defines digital content as “data which are produced and supplied in digital form” which is similar to the definition embodied in the CRD. This broad definition can cover not only the digital contents in a tangible form like a CD or DVD, but also electronically purchased and downloaded digital contents as well (Linklaters, n d).

Section 3 of the CRA provides the contracts covered by the Chapter 2. As described by the Explanatory note 55 of the Act, “any of the specific types of contracts defined in the Act, the provisions apply whether goods are supplied alone or alongside a service and/or digital content”. Therefore, it is evident that the CRA is applicable to all form of contract if it is online or offline. One of the leading economic experts in the UK, Sir Vince Cable opines the benefit of this new features of the CRA as follows,

“Consumers will now be much better informed and protected when buying goods or services on the internet. They will now be entitled to get for the first time a free repair or replacement for any faulty digital content.” (Barsby,2015)

Accordingly, CRA affords some significant statutory rights for consumers, such as

- Section 9 : Goods to be of satisfactory quality
- Section 10: Goods to be fit for a particular purpose
- Section 11: Goods to be as described
- Section 12: Other pre-contract information included in the contract
- Section 14: Goods to match a model seen or examined
- Section 16: Goods not conforming to contract if the digital content does not conform
- Section 20: Right to reject
- Section 23: Right to repair or replacement

All these rights are more important for enhancing the confidence of online consumers as well and particularly, with regard to the contract on digital contents, those contracts also subjected to the similar provisions. Among them, Section 11 and 12 deal with the information requirement from the suppliers and this requirement is much similar to the information requirement in the CRD. For the information purpose, the CRA refers that the information required from the Schedule 1 and 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, forms part of the Contract.

According to the Schedule 1 and 2 of the Consumer Contracts Regulations, before the consumer is bound by an on-premises contract or distance and off-premises contract, the trader must give or make available to the consumer the information regarding,

- the main characteristics of the goods or services;
- the identity of the trader;
- the geographical address at which the trader is established;
- the total price of the goods or services;
- the cost of using the means of distance communication and etc..

Therefore it is evident that, the CRA also attempt to regulate more comprehensive information requirement for the benefit of consumers. Moreover, as mentioned above, Section 20, of the CRA enable consumers to exercise the right to reject in three stages namely, short-term right to reject, final right to reject and the right to reject under Section 19 (6). Section 22 provides that the time limit for exercising the short-term right to reject is the end of 30 days. This right also strengthens the consumer’s sovereignty under the CRA. Particularly,

in online consumers' perspective, this is much effective as they are dealing with unknown sellers and vendors without physically touching the goods.

Furthermore, as El-Gendi (2017) argues, the CRA brings more protection to the consumers who enter into standard form of contracts. As he points out, only 7% of Britons read the terms and conditions of the contracts for products and services into which they entered online and therefore, businesses are, hypothetically, left with the opportunity to enforce unfair and unethical terms, reducing their obligations and increasing the burdens of the consumer.

This issue has been addressed by the CRA , through Section 65, which states that “A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence”. This provision strengthens the protection of consumers who are engaging with click-wrap or shrink-wrap agreements through electronic mean. Accordingly, it can be argued that, the CRA is a significant piece of legislation, which is carefully designed to address the both online as well as offline consumer protection issues.

In addition to the CRA, the UK parliament has introduced the Data Protection Act (the DPA) in 1998 based on the EU Data Protection Directive. As Mcfarlanes(2008) highlights the DPA regulates the processing of personal data by data controllers. The Data Protection Act (DPA) applies to “personal data”, which is data relating to a living individual who can be identified from this data or from a combination of this data with other information in the possession of..(Section 1(1), DPA,). Moreover, the Act requires the data controllers to use the data held fairly and lawfully and not retain the data longer than is necessary for the stated purposes (Section 27 (4)). Accordingly, it can be argued that besides the CRA and other regulations, the DPA also entrust the consumer’s privacy in the online environment.

E. Comparative Analysis of EU, UK and Sri Lankan Jurisdictions

The following table presents a brief summary about how EU and UK laws adopted solutions for some of the major issues faced by online consumers and whether Sri Lankan law has any provisions to deal with those issues.

Issues	EU law	UK law	Sri Lankan law
Information disclosure	Article 4 of the DSD, the E-Commerce Directive and the CRD	Section 11 and 12 of the CRA Schedule 1 and 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013	No specific provision (Only, section 24 of the CAAA makes an obligation to traders to display price list)
Cooling-off period	Distance Selling Directive Article 6-7 days CRD Article 9 – 14 days	Section 20, of the CRA enable consumers to exercise right to reject in three stages namely, short-term right to reject, final right to reject and the right to reject under Section 19 (6).	No provision
Privacy	The Privacy and Electronic Communication Directive recognizes the right to privacy as a part of the fundamental rights and freedom	Data Protection Act, 1998	No separate legislation for data protection. Section 10 of the CCA recognizes unauthorized disclosure of information as a computer crime
Dispute resolution	Article 17 of the E-Commerce Directive encourage the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means Directive on Consumer ADR and Regulations on ODR in 2013 established the ODR Platform in 2016	The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 – Section 19A provides that an online trader is obliged to use an alternative dispute resolution procedure provided by an ADR entity or EU listed body	No specific provisions. However, under the CAAA a consumer can make a complaint to the Consumer Affairs Council and it can be referred to the Magistrate Court (Section 32 and 34 of the CAAA)

Table 1. A comparative analysis of EU, UK and Sri Lankan Jurisdiction

As mentioned in the above table, the findings of the comparative analysis with Sri Lankan legal framework demonstrates that there are some gaps in Sri Lankan law with regard to some of the major issues in online consumer protection. Therefore, it is necessary to find out speedy solutions to those issues in order to enhance the e-commerce growth in Sri Lanka.

IV. CONCLUSION

Today, a country cannot go forward without applying the advancement of technology. The e-commerce sector of Sri Lanka is ready to boost in next few decades. However, the lack of proper consumer protection mechanism in an online environment creates a barrier to the growth of e-commerce. Therefore, as a developing country, it is necessary to take relevant steps to remove this barrier from the e-commerce sector in Sri Lanka. The EU and UK examples demonstrate that how those countries overcome this issue by enacting strong consumer protection mechanism for online consumers. This research attempts to emphasize this gap in Sri Lankan legal system and in order to enhance the online consumer protection in Sri Lanka.

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