

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 20.07.1994

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**AMENDING DIRECTIVE 85/611/EEC ON THE COORDINATION OF LAWS,
REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO
UNDERTAKINGS FOR COLLECTIVE INVESTMENT IN TRANSFERABLE SECURITIES
(UCITS)**

(presented by the Commission pursuant to Article 189 A (2)
of the EC-Treaty)

**AMENDED PROPOSAL FOR A EUROPEAN PARLIAMENT
AND COUNCIL DIRECTIVE AMENDING DIRECTIVE 85/611/EEC ON THE
COORDINATION OF LAWS, REGULATIONS AND ADMINISTRATIVE
PROVISIONS RELATING TO UNDERTAKINGS FOR COLLECTIVE INVESTMENT
IN TRANSFERABLE SECURITIES
(UCITS)**

(Presented by the Commission pursuant to Article 189A(2) of the EU-Treaty)

EXPLANATORY MEMORANDUM

GENERAL CONSIDERATIONS

1. The proposal for a Council Directive amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) was published on 9 February 1993 (COM(93)37 final - SYN 453). Since then a considerable amount of work has been undertaken, e.g. by the European Parliament, the Economic and Social Committee, and the industry. This amended proposal incorporates a substantial number of amendments proposed by the European Parliament, most of which the Commission accepted in principle, though, in some cases, not the precise wording.
2. Since the amended proposal includes a large number of changes, many of which are simply drafting improvements, it has been found most appropriate to include the whole text of the proposal, and not only the changes. Changes compared with the original proposal are underlined and deletions are shown by square brackets.

COMMENTS ON THE INDIVIDUAL AMENDMENTS

Title and headings

After entry into force of the Treaty on European Union, this proposal for a Directive shall be adopted in accordance with the procedure referred to in Article 189b of the Treaty. Therefore some textual changes have been made in the headings in order to show that the proposal, when adopted, will be a European Parliament and Council Directive.

Recital n° 2

This change refers to the inclusion of cash-funds and master-feeder funds within the scope of the Directive.

Recitals n° 3, 5, 6, 10, 11 and 13

The changes to these recitals have been made for reasons of clarification.

Recital n° 5a

This recital justifies the inclusion of feeder funds as they do not add any extra risk for investors.

Article 1

Amendment n° 1

First of all, UCITS may now invest up to 25% of their assets in bank deposits. In addition the scope of the Directive is widened to include (i) funds investing 100% of their assets in bank deposits and (ii) master-feeder funds. (Funds of funds were added by the original proposal for an amendment.)

Then, the full text of the definition of "transferable securities" from the Investment Services Directive (ISD) has been introduced so as to achieve alignment with that directive.

It is made clear that derivative products are neither transferable securities nor money market instruments.

Amendments n° 2 and 4

Unchanged.

Amendments n° 3 and 5

The main change is that, in accordance with Article 59 of the Treaty on free provision of services, UCITS shall be able freely to choose a depositary established in another Member State if the depositary is authorized under the ISD or the Second Banking Directive. The purpose also is to lay down some provision to ensure the supervision of depositaries operating on a cross-border basis providing services to unit trusts (Article 8) and to investment companies (Article 15).

Amendment n° 6

Parliament requested that "money market instruments" should fulfil some minimum quality criteria in order to be eligible for UCITS investment.

In general, money market instruments shall be exchange traded or dealt in on regulated markets or must be issued or guaranteed by either public institutions (States, local authorities, international bodies) or entities of high ranking (e.g. which have a 0% or 20% risk weight according to the Solvency Ratio Directive). Also eligible are instruments issued by an undertaking, the securities of which have been admitted to listing on a stock exchange, or are dealt in on other regulated markets, and instruments issued by entities subject to prudential supervision.

Although Parliament suggested including the list of quality criteria in Art. 1, this point was finally added in Art. 19, where all criteria referring to transferable securities and other instruments are laid down.

Amendment n° 7

Unchanged.

Amendment n° 7a

This change has been introduced at the request of Parliament to allow UCITS to hold banking deposits up to a certain limit (25% of assets).

Amendment n° 8

This is a clarification of the text under which financial futures and options are stated to be examples of financial derivative instruments.

Amendment n° 9

A derogation to Article 19(4) introduces the concept of "pure cash-funds", allowed to place all of their assets in banking deposits, following a diversification rule.

Amendments n° 10 and 11

Unchanged.

Amendment n° 12

The limit of investment of a management or an investment company in shares of a single issuer of 10% has been transformed into a "presumption" of significant influence. Therefore, it is open to Member States to demonstrate that an upper limit does not imply significant influence. Member States also have the power to use a lower threshold.

Amendment n° 13

Unchanged.

Amendment n° 14

Article 26a dealing with Funds of UCITS is unchanged.

Article 26b is new and introduces the concept of master-feeder funds. It is proposed that Member States may authorize a Fund of UCITS (a "feeder fund") to invest exclusively in units issued by one single UCITS (a "master fund"). The concept of feeder funds is new in the European markets, but these funds have proved to be very efficient in the US market.

An advantage of feeder funds compared with "normal" Funds of UCITS is that they can benefit from economies of scale. In the European context a series of individual feeder funds based in a number of Member States could pool their assets under management in a separate entity located in a single Member State.

Since assets are pooled into the master fund, many feeder funds could thus participate in a larger portfolio, which could benefit from better conditions on the market, lower unit expenses and greater diversification. The individual feeder funds deal with the marketing and distribution activities. This mechanism represents an efficient way of allowing cross-border access by small investors to other European financial markets.

Amendments n° 15 and 16

Unchanged.

Amendment n° 16a (new).

The new paragraphs 5, 6 and 7 of Article 49 are included as a consequence of amendments nos. 3 and 5. The purpose of these paragraphs is to make the division of responsibilities clear in situations where the depositary is a credit institution or an investment firm not established in the Member State of the UCITS.

Amendment n° 17

Unchanged.

ADDITIONAL COMMENT

In its original proposal the Commission had proposed bringing the provisions on professional secrecy in line with similar provisions in the Investment Services Directive and the Second Banking Directive. In the meantime a new proposal to strengthen those provisions in the above two directives has been made (proposal for a Directive to strengthen prudential supervisory powers (post BCCI)) and Article 50 of the UCITS Directive ought also to be brought in line with these new provisions. It has therefore been found most appropriate, not least for the question of timing, to transfer Article 50 to this other proposal.

Articles 2 and 3

Unchanged.

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DIRECTIVE AMENDING DIRECTIVE 85/611/EEC ON THE COORDINATION
OF LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS
RELATING TO UNDERTAKINGS FOR COLLECTIVE INVESTMENT IN
TRANSFERABLE SECURITIES (UCITS)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57(2) thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the Economic and Social Committee,²

1. Whereas the scope of Council Directive 85/611/EEC was confined initially to collective investment undertakings of the open-end type which promote the sale of their units to the public in the Community and the sole object of which is investment in transferable securities; whereas it was envisaged in the preamble to Directive 85/611/EEC that undertakings falling outside its scope would be the subject of coordination at a later stage;
2. Whereas money market funds, cash funds, funds of UCITS and master-feeder funds, [.....] given their operational features and investment objectives, may be regarded as very close to UCITS; whereas it is desirable to bring these funds within the scope of Directive 85/611/EEC since [.....] this [.....] would facilitate the removal of the restrictions on the free circulation of the units of these funds in the [.....] European Union and such coordination is necessary to bring about a European capital market;

¹OJ no. C 59 - 2.3.1993, p. 14.

²OJ no. C 249 - 13.9.1993, p. 15.

3. Whereas the inclusion of money market funds is achieved by allowing UCITS to invest freely in money market instruments while preserving the guarantees necessary to give adequate protection to investors; whereas money market instruments cover those classes of transferable instruments which are normally dealt in on the money market, for example treasury and local authority bills, certificates of deposit, commercial paper and bankers' acceptances; whereas Member States should have the option of choosing the list of eligible money market instruments on the basis of objective criteria to take account of the existing structural differences in the money markets of different countries;
4. Whereas, to take market developments into account, it is desirable that the investment object of UCITS is widened in order to permit them [.....] to invest in banking deposits;
5. Whereas only UCITS investing solely in units issued by other UCITS (fund of UCITS) may be brought within the scope of Directive 85/611/EEC; whereas a Fund of UCITS may be identified on the basis of the number of UCITS in which it can invest; whereas the requirement of risk spreading for Funds of UCITS is indirectly respected since Funds of UCITS can only invest in units issued by UCITS complying with the risk spreading criteria of the directive; whereas, while it is acceptable in certain circumstances for UCITS to invest in another UCITS, it is important that a fund of UCITS ensures investors an adequate degree of disclosure on the costs they incur;
- 5a. Whereas it is also appropriate to include in the scope of Directive 85/611/EEC funds having a master fund/feeder fund structure insofar as they constitute a single entity, affording investors the same safeguards as do traditional UCITS;

6. Whereas it is appropriate that, except for explicitly mentioned exemptions, the rules laid down for the authorization, supervision, structure and activities of UCITS and for the information to be published should also apply to [.....] the funds now brought within the scope of Directive 85/611/EEC;
7. Whereas, for prudential reasons, UCITS should avoid assuming an excessive concentration of banking deposits to a single credit institution;
8. Whereas many directives have been adopted in the financial field in recent years; whereas it seems therefore advisable to bring some Articles of Directive 85/611/EEC more in line with existing provisions of Community legislation;
9. Whereas Council Directive 89/646/EEC and Directive 93/22/EEC (Investment Services Directive) provided the basis for the single licence to supply financial services to credit institutions and investment firms respectively; whereas Member States should not therefore restrict the freedom of UCITS to choose a depositary established in another Member State and authorized under the above Directives.
10. Whereas it is desirable to make the depositary function accessible to institutions and firms of third countries; whereas it is essential to provide that the rules applied to such firms may not be more favourable than those for branches of institutions and firms from another Member State;
11. Whereas Article 21 of Directive 85/611/EEC contains the rules under which UCITS are allowed to use derivative instruments; whereas it is necessary for the protection of investors to provide for a harmonized framework by introducing a maximum quantitative ceiling for the utilization of financial derivatives; whereas, considering the new portfolio management techniques which have developed in recent years, it is desirable that UCITS may use, in compliance with the above quantitative limit, financial futures and options for the purpose of adjusting their portfolio's composition on a temporary basis;

12. Whereas the current limit of 5% concerning the possibility for UCITS of investing in other UCITS proved to be too stringent in certain markets;
13. Whereas Article 25(1) of Directive 85/611/EEC envisaged a coordination of the concept of significant influence at a later stage; whereas, given the result achieved in this field in other Directives, it is desirable to define significant influence in terms of a quantitative limit;
14. Whereas it is appropriate to favour the reduction of costs related to translation of documents in the cross-border marketing without impairing the degree of investor protection;
15. Whereas technical adaptations to the rules laid down in this Directive may from time to time be necessary to take new developments in the investment funds field into account; whereas it is desirable to set a general criterion to define the technical nature of modifications; whereas it is important that these technical modifications should be adopted in accordance with the procedure established in Directive .../.../EEC,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

In Directive 85/611/EEC as amended by Directive 88/220/EEC the following amendments are made:

Amendment n°1

In Article 1, paragraph 2 shall be replaced by the following:

"2. For the purposes of this Directive

i. subject to Article 2(1), "UCITS" shall be undertakings:

- the sole object of which is the collective investment in transferable securities and deposits with credit institutions of capital raised from the public and which operate on the principle of risk-spreading, or
- the sole object of which is the collective investment in deposits with credit institutions of capital raised from the public in accordance with the rules laid down in Article 22(6) and which operate on the principle of risk-spreading, or
- the sole object of which is the collective investment in units of other UCITS in accordance with Article 26a of capital raised from the public and which operate on the principle of risk-spreading, or
- the sole object of which is the collective investment in units of one single UCITS of capital raised from the public, so that a two-tier structure defined as a master-feeder fund is created in accordance with Article 26b, and
- the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.

ii. "Transferable securities" shall mean

- shares in companies and other securities equivalent to shares in companies.
- bonds and other forms of securitized debt,

which are negotiable on the capital market,

and

- any other securities normally dealt in which carry the right to acquire any such transferable securities by subscription or exchange.

Excluding instruments of payments and the techniques and instruments referred to in Article 21(1) and (3).

iii. "Money market instruments" which, for the purposes of this Directive, shall be regarded as transferable securities, shall mean those classes of transferable instruments normally dealt in on the money market which the Member States consider to:

- be liquid, and
- have a value which can be accurately determined at any time or at least with the frequency stipulated in Article 34 excluding the techniques and instruments referred to in Article 21(1) and (3)"

Amendment n°2

In Article 8, paragraph 1, is replaced by:

"1. A depositary must have an establishment in the same Member State as that of the management company."

Amendment n°3

In Article 8 the following two paragraphs shall be added:

"4. By way of derogation from paragraph 1, an undertaking [.....] whose authorization under Directive 89/646/EEC or Directive 93/22/EEC permits it to provide safekeeping and administration services shall not be prevented from exercising the function of depositary on the basis of the freedom to provide services. To exercise this freedom, the undertaking must :

- comply with the provisions of Articles 7, 9, 10 and 11;
- declare that it has full knowledge of the legislation applicable to it when providing cross-border depositary services;
- provide the competent authorities responsible for supervision of the unit trust with all information they may require;
- conform to the supervisory rules provided for within cooperation agreements concluded between authorities of the relevant States.

The authorities responsible for the supervision of the unit trust may request the authorities responsible for supervision of the entity which is candidate to be a depositary to cooperate in order to assess its organisation.

The above-mentioned cooperation agreements must state that, in case the responsible authorities of the unit trust have not been able to resolve an irregular situation of the depositary operating under the freedom to provide services, the home country authorities of the depositary must take appropriate measures to resolve that situation.

5. Member States shall not apply to depositaries which are branches of institutions or firms having their head office outside the Community, when commencing or carrying on their services, provisions which result in more favourable treatment than that accorded to depositaries which are branches of institutions or firms having their head office in the Community."

Amendment n°4

In Article 15, paragraph 1, is replaced by:

"1. A depositary must have an establishment in the same Member State as that of the investment company."

Amendment n°5

In Article 15 the following two paragraphs shall be added:

"4. By way of derogation from para. 1, an undertaking [.....] whose authorization under Directive 89/646/EEC or Directive 93/22/EEC permits it to provide safekeeping and administration services shall not be prevented from exercising the function of depositary on the basis of the freedom to provide services. To exercise this freedom, the undertaking must :

- comply with the provisions of Articles 7, 9, 10 and 11;
- declare that it has full knowledge of the legislation application to it when providing cross-border depositary services;
- provide the competent authorities responsible for supervision of the investment company with all information they may require;
- conform to the supervisory rules provided for within cooperation agreements concluded between authorities of the relevant States.

The authorities responsible for the supervision of the investment company may request the authorities responsible for supervision of the entity which is candidate to be a depositary to cooperate in order to assess its organisation.

The above-mentioned cooperation agreements must state that, in case the responsible authorities of the investment company have not been able to resolve an irregular situation of the depositary operating under the freedom to provide services, the home country authorities of the depositary must take appropriate measures to resolve that situation.

5. Member States shall not apply to depositaries which are branches of institutions or firms having their head office outside the Community, when commencing or carrying on their services, provisions which result in more favourable treatment than that accorded to depositaries which are branches of institutions or firms having their head office in the Community."

Amendment n°6

In Article 19 the following shall be added to paragraph 1

"and/or

- (e) money market instruments.

If such instruments are not admitted to official listing on a stock exchange or are not dealt in on other regulated markets which operate regularly, are recognized and are open to the public and unless the issue of such instruments is itself regulated for the purpose of protecting investors and savings, they must:

- be issued or guaranteed by a central, regional or local authority, a central bank of a Member State, the European Union or the European Investment bank, a non-Member State or, if the latter is a Federal State, by one of the members making up the federation, or by a public international body to which one or more Member States belong, or
- be issued by an undertaking the securities of which have been admitted to official listing on a stock exchange or are dealt in on other regulated markets which operate regularly, are recognized and are open to the public, or
- be issued or guaranteed by an establishment subject to prudential supervision, in accordance with criteria defined by Community law or by establishment which are subject to and comply with prudential rules considered by the competent authorities as at least as stringent as those laid down by Community laws.

Amendment n°7

In Article 19, paragraph 2(b) after "10% of its assets in debt instruments" shall be added "other than money market instruments".

Amendment n°7a

Article 19, paragraph 4, shall be replaced by :

"4. A UCITS may invest up to 25% of its assets in deposits with credit institutions. This limit shall not apply to:

- (a) UCITS constituted as "cash funds" as laid down in Article 22(6).
- (b) ancillary liquid assets held incidentally by a UCITS of any kind."

Amendment n°8

In Article 21 the following paragraph shall be added:

"3. In this context UCITS may carry out transactions in financial derivative instruments, such as financial futures and options, provided that the exposures relating to such instruments are covered by [.....] assets which may reasonably be expected to fulfil actual or potential obligations which exist or may arise as a result of the derivatives themselves."

Amendment n°9

In Article 22 the following paragraph shall be added:

"6. Notwithstanding the limit laid down in Article 19(4), a UCITS may invest all its assets in deposits with credit institutions provided that:

- (a) it has expressly mentioned in its instruments of incorporation or fund rules and in its prospectus or any promotional literature that it is a "cash fund";
- (b) it has placed no more than 25% of its deposits with the same credit institution or credit institutions within the same group."

Amendment n°10

In Article 24, paragraph 1, "of the first and second indents of Article 1(2)" shall be replaced by: "of the first and third indents of Article 1(2)(i)".

Amendment n°11

In Article 24, paragraph 2, "5%" shall be replaced by: "10%"

Amendment n°12

In Article 25, paragraph 1, shall be replaced by the following:

"1. An investment company or a management company acting in connection with all of the unit trusts which it manages and which falls within the scope of this Directive may not acquire any shares carrying voting rights which directly or indirectly make it possible to exercise a significant influence over the management of the issuing body.

An investment company's or a management company's holding of 10% or more of the voting rights defined in Article 7 of Directive 88/627/EEC shall constitute a presumption of significant influence. In the case of management companies, the calculation of voting rights shall take account of the rights held by a management company itself and by all the unit trusts it manages.

Member States may set a percentage lower than that referred to in the preceding subparagraph.

Member States may allow investment companies and management companies to demonstrate that the threshold may be exceeded without constituting exercise of a significant influence.

Amendment n°13

In Article 25, paragraph 2, third indent, "of the first and second indents of Article 1(2)" shall be replaced by: "of the first and third indents of Article 1(2)(i)".

Amendment n°14

After Article 26 the following new Articles 26a and 26b shall be added:

"Article 26a

Notwithstanding Article 24(2), Article 24(3) first subparagraph and Article 25(2) third indent a UCITS (hereinafter referred to as a "Fund of UCITS") may invest its assets in units issued by other UCITS provided that the following conditions are met:

- (a) a Fund of UCITS must invest its assets exclusively in units issued by UCITS subject to the provisions of this Directive. It may hold banking deposits and ancillary liquid assets in accordance with Article 19(4), but must not invest in transferable securities, or in units issued by other Funds of UCITS;
- (b) a Fund of UCITS must not invest more than 20% of its assets in a single UCITS which meets the criteria set out in (a);
- (c) a Fund of UCITS must describe in its instruments of incorporation or fund rules and in its prospectus and any promotional literature the characteristics of the UCITS in the units of which it is authorized to invest. The prospectus must clearly describe the nature of fees, charges, taxes, commissions and other costs which directly or indirectly are expected to be borne by the Fund of UCITS' unit-holders.

Article 26b

1. Notwithstanding Article 24(2), Article 24(3), first sub-paragraph and Article 25 (2) third indent, Member States may authorize a UCITS ("a feeder fund") to invest its assets in units issued by one single UCITS ("a master fund"), whose units would therefore be distributed indirectly through one or more feeder funds, provided that :
 - (a) all feeder funds and the master fund are UCITS governed by this Directive;
 - (b) a contractual relationship between the master fund and each feeder fund is established. This contract must include:

- all the rights which the investor in the feeder possesses in relation to the master fund and its depositary, which may be invoked either directly or indirectly;
- the main characteristics of the master fund's investment policy;
- the rules which govern the possible modification of the investment policy of the master fund;
- a provision which states that all information concerning the master is available to the feeder's supervisory authority and that all information concerning the feeder is available to the master's supervisory authority;

(c) the feeder fund has included in its prospectus:

- an accurate description of the contractual relationship provided for in (b) and of its content;
- all information about its charges and management fees, the master fund's charges and fees and the system of taxation applied to both funds;
- all information concerning the organisation and the investment policy of the master fund;
- a description of the rights of the investor towards the master fund provided for in (b);

(d) in case the feeder fund and the master fund are situated in different Member States, the competent authorities concerned are informed of the structure and the linkages of these two funds so that they are able to collaborate closely in accordance with the provisions of Article 50 of this Directive;

- (e) the feeder fund invests exclusively in units of the master fund and may hold banking deposits and ancillary liquid assets in accordance with Article 19(4):"

Amendment n°15

In Article 44 paragraph 2 shall be replaced by the following:

"2. Nothing in paragraph 1 shall prevent UCITS with head offices in other Member States from advertising their units through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good."

Amendment n°16

In Article 47, the following words : "in at least one of that other Member State's official languages"; is replaced by : "in a language which is easily understandable for the investors concerned in that other Member State".

Amendment n°16a

In Article 49 new paragraphs shall be added :

- "5. In the case of a depositary offering services to a unit trust/an investment company in accordance with the provisions of Directive 89/646/EEC or Directive 93/22/EEC, the authorities referred to in paragraph 1 shall remain responsible for the effective compliance of the depositary with its obligations under the national law to which the unit trust/investment company is subject.
6. Without prejudice to the other provisions of this Directive, Member States shall require that a contract shall be concluded between a UCITS and the depositary operating under freedom of services in accordance with the provisions of Directive 89/646/EEC or Directive 93/22/EEC. This contract shall include provisions under which the depositary is obliged to supply the competent authority responsible for the supervision of the UCITS with the information necessary for that authority to gain full knowledge of the UCITS' assets, and to execute any request by that authority to prohibit the free disposal of those assets.

7. *Each Member State shall designate the competent authorities responsible for intervening, at the request of the competent authority responsible for the supervision of UCITS, in order to ensure that the depositary supplies the information referred to or in order to prohibit the free disposal of the UCITS' assets in accordance with paragraph 5.*

The Commission shall send Member States the list of authorities designated under the first subparagraph."

Amendment n°17

After Article 53 the following new Article 53a is added:

"Article 53a

1. The technical modifications to be made to this Directive in the following areas shall be adopted in accordance with the procedure laid down in Directive .../EEC (Securities Committee):

- clarification of the definitions in order to ensure uniform application of this Directive throughout the Community;
- adaptation of the ceilings referred to in Article 19(2) and (3), 21(3), 22, 24(2), 25 and 36(2) where such adaptations will not lead to more strict requirements for the UCITS in order to take account of developments on financial markets;
- alignment of terminology on and the framing of definitions in accordance with subsequent acts on firms and related matters".

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1996 at the latest.

When Member States adopt the measures referred to in the first subparagraph, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of provisions of national law which they adopt in the field governed by this Directive.

Article 3

This Directive is addressed to the Member States.

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