

# Competition and sustainability - the avatars of the modern world

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**Abstract.** Environmental protection and climate change are by far the hottest topics in contemporary competition policy. In fact, sustainability and competition often go hand in hand. All companies should compete for the most favourable and best solution for customers. In turn, consumers are immersing themselves deeper in the magic of consumption, and the pandemic period has led to the growth of online commerce in all markets. In the present study we aim to analyse to what extent consumer behaviours and competitiveness affect sustainability.

## 1 Introduction

### 1.1 The legislative batch

In December 2019, the European Commission presented the European Ecological Pact [1], through which it proposed new strategies leading to the transformation of the EU ‘into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse found in 2050 and where economic growth is decoupled from resource use’.

In this context, competition policy must constitute one of the basic pillars of these transformations and strengthen the transition towards a greener, more digital economy. The application of competition policy and legislation aims, as a last strategy, to contribute to the effectiveness of the European Green Deal by maintaining efficient, fair and innovative markets.

Thus, the General Directorate of Competition focused mainly on the way in which environmental and climate policies could be correlated with those existing in the field of antitrust, economic concentrations and state aid. All these efforts have been concretized by the General Directorate of Competition in an analysis named ‘Competition Policy in Support of Europe's Green Ambition’ [2] which provides examples of concrete reforms of competition policies.

On 4 February 2021, the Directorate-General for Competition organised a conference hosted by Executive Vice President Margrethe Vestager to discuss how competition policy can contribute to the Green Deal. ‘*Competition Policy is not in the lead when it comes to*

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*fighting climate change and protecting the environment – there are better, much more effective ways, such as regulation and taxation. However, competition policy can complement regulation and the question is, how could it do that most effectively?’*

As a result, during 2021, the Commission adopted a series of measures aimed at supporting the transition to a green economy of the European Union, including: European Battery Innovation in the field of state aid and continued to approve a series of aid schemes state to the member states (Romania, Germany, Denmark, France) intended to contribute to the European objective of achieving climate neutrality by 2050, without justifiably distorting competition. In parallel, the Commission launched a series of investigations and applied antitrust and merger control rules which played a part in the transition to a green economy.

All these actions of the General Directorate of Competition are part of a wider legislative package of the European Commission, entitled ‘Fit for 55?’ which constitute a set of proposals for new European Union legislation aimed at achieving the 2030 climate objective and which refer, among other things, to:

- the EU system for trading emission certificates;
- EU’s Effort Sharing Regulation;
- land exploitation and forestry;
- infrastructure for alternative fuels;
- the carbon border adjustment mechanism;
- the fund for mitigating the social impact of climate actions;
- ReFuelEU in the aviation field and FuelEU in the maritime field;
- standards regarding CO2 emissions for cars and vans;
- energy taxation;
- energy from renewable sources;
- energetic efficiency;
- energy performance of buildings.

These are joined by a number of other strategies aimed at tackling the environmental crisis and achieving a circular, clean and resource-efficient economy:

- A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system [3];
- A new circular economy action plan for a cleaner and more competitive Europe [4];
- EU Biodiversity Strategy for 2030 [5];
- Pathway to a Healthy Planet for All. EU Action Plan: ‘Towards Zero Pollution for Air, Water and Soil’ [6].

Moreover, the Commission highlighted in the Report on Competition Policy 2021 [7] all the efforts of the General Directorate of Competition, underlining the fact that ‘the application of the policy in the field of competition stimulates competition with a view to a post-pandemic recovery and a greener, more digital economy, more resilient and more favourable to inclusion in the EU’. In this report, the Commission says it will carry out an unprecedented review of EU competition policy to ensure that EU competition policy instruments remain future proof.

The revision of the main antitrust, merger and state aid rules will consider market developments that have transformed the way businesses operate, including the development of e-commerce and online platforms.

Antitrust enforcement ensures that businesses only enter into agreements that benefit the market at large and consumers, and that dominant businesses do not use their position in a market to eliminate competitors or exploit customers. Merger control must ensure that enough competitors remain in a market so that competition is not distorted by a merger or acquisition. State aid rules must support Member States' efforts to invest in the national economy and help businesses transition to a green economy. In this sense, we can appreciate that through the Guidelines on state aid for environmental protection and energy [8], the first

steps have been taken towards achieving the climate objectives by increasing the use of renewable energy sources.

However, we must add that only the efforts of the states and the European Union are not enough. Something more is needed: businesses must understand that they must also contribute to this endeavour, through innovation and investment, in order to be able to compete better in a globalized economy that wants to be a green one. In turn, consumers must change their consumption behaviours to prepare for the transition to a greener economy.

Therefore, the competition rules will complement the 'Fit for 55' legislative batch by creating a competitive, investment-based market to ensure the transition to a green economy. The Commission has estimated that at least 30% of Europe's long-term budget will be allocated to combating climate change.

## **1.2 Revision of the rules on the definition of the relevant market**

The starting point will be the definition of the concepts of the relevant market, the product market and the geographic market, which will respond to the current demands and to include the digitization of the markets, but also all the changes that have taken place in the last 20 years in the competitive environment [9]. In this sense, the Commission launched a consultation of the national competition authorities of the member states and the business environment. It also requested an external evaluation that took into account four specific aspects of market definition, namely: innovation, digitization, geographic market definition, and quantitative techniques. The definition of the market must reflect its current demands and allow the identification of potential competitors at the local or national level.

The evidence gathered in the evaluation revealed several issues that should be updated when defining the relevant market. These include the digital ecosystem, the assessment of geographic markets under globalization, non-price competition (including innovation), the calculation of market shares, and the use and purpose of the SSNIP test (small significant non-transitory increase in price) [10].

Executive Vice-President Margrethe Vestager, responsible for competition policy, said on this occasion: 'We need to look at the market and the boundaries of the market in which companies compete (...) The basic principles of the Communication on market definition, based on the jurisprudence of the EU courts, remain sound and today. At the same time, the assessment indicates that the Notification does not fully cover recent developments in market definition practice, including those related to the digitization of the economy. We will now consider whether and how the Notice should be revised to address the issues we have identified' [11].

## **2 State Aid**

The review of state aid rules is intended to support the Commission's environment, climate and energy objectives. Competition policy, and in particular State aid rules, have an important role to play in enabling and supporting the Union in meeting its Green Deal policy objectives. Thus, state aid that will ensure climate neutrality will be able to be declared compatible with the internal market under Article 107 paragraphs (2) and (3) of the Treaty of the Functioning of the European Union.

In November 2021, the Commission adopted a revised Communication on State aid rules for important projects of common European interest (the PIIEC Communication), which applies from 1 January 2022 [12]. The 2021 Communication aligns its objectives with the priorities of current EU's policies to support environmental strategies and accelerate the green transition. At the same time, in order to meet the EU's climate and energy objectives

for 2030 and 2050 such as decarbonisation of industry, supporting all technologies that can implement the European Green Deal, energy performance of buildings, biodiversity, zero emissions, clean mobility, the Commission launched a series of public consultations to review State aid rules: Public consultation on the Framework for State aid for research, development and innovation [13], Public consultation on the Guidelines on State aid for broadband networks [14].

Also, the General Block Exemption Regulation was amended in July 2021 to allow Member States to grant State aid for the digital and green transition. The scope of the Regulation will be extended to areas such as the energy performance of buildings, recharging and refuelling infrastructure for clean mobility, efficient use of resources and biodiversity, investments in new technologies such as hydrogen and the capture, storage or use of carbon dioxide.

In February 2022, the Commission published the Guidelines on State aid for climate, environmental protection and energy 2022 [15]. The document provides guidance on how the Commission will assess the compatibility of environmental protection measures, including climate protection, and energy aid that are subject to the notification requirement under Article 107(3)(c) of the Treaty. A measure of aid can be declared compatible with the internal market if it fulfils two conditions: the aid facilitates the development of an economic activity and does not adversely affect trading conditions to an extent contrary to the common interest.

The Commission establishes the categories of state aid that are subject to these guidelines, namely:

- aids for renewable energy;
- aids for the improvement of the energy and environmental performance of buildings;
- aids for clean mobility;
- aids for resource efficiency and for supporting the transition towards a circular economy;
- aids for the prevention or the reduction of pollution other than from greenhouse gases;
- aids for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation;
- aids in the form of reductions in taxes or parafiscal levies;
- aids for the security of electricity supply;
- aids for energy infrastructure;
- aids for district heating and cooling;
- aids in the form of reductions from electricity levies for energy-intensive users;
- aids for the closure of power plants using coal, peat or oil shale and of mining operations relating to coal, peat or oil shale extraction;
- aids for studies or consultancy services on matters relating to climate, environmental protection and energy.

Recently, on the basis of these Guidelines, the Commission approved the modification of two German state aid schemes to contribute to the achievement of Germany's energy and environmental objectives and the EU's strategic objectives related to the European Green Deal.

The first scheme aims to support the production of electricity from renewable energy sources, by reaching a share of 80% of electricity produced from renewable energy sources by 2030, with a view to achieving climate neutrality by 2045 [16]. The second scheme is intended to support the production of offshore wind power in Germany [17]. In both cases, the Commission found that the positive effects of the scheme, in particular the environmental ones, outweighed any possible negative effects in terms of distortion of competition.

In conclusion, state aid has the capacity to accelerate the transition to a green economy. It is particularly important that the State aid is properly granted and does not distort

competition. For example, aid in the form of research and development expenditure is essential for the energy transition, in the sense that it could contribute to the reduction of business risks and the promotion of green initiatives. So, it is noticeable that we are witnessing the transition to a new era of state aid evaluations, through the lens of environmental protection objectives.

## **3 Agreements between enterprises**

### **3.1 Vertical agreements**

Article 101(1) TFEU prohibits anti-competitive agreements between enterprises that have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 101 (3) TFEU provides for their exclusion if they contribute to the improvement of the production or distribution of products or to the promotion of technical or economic progress, at the same time assuring consumers a fair share of the benefit obtained and which: (a) do not impose on the companies in question restrictions that are not indispensable for achieving these objectives; (b) does not give undertakings the possibility of eliminating competition in respect of a significant part of the products in question.

New market developments, such as the emergence of online markets, the development of e-commerce, sustainable development have led to the replacement of Regulation (EU) no. 330/2010 [18] with Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101 paragraph (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices starting on 31 May 2022. [ 19]

The notion of sustainability is defined in the Guidelines on Vertical Restrictions [20], in the sense that it ‘includes, but is not limited to addressing climate change (for example, by reducing greenhouse gas emissions), limiting the use of natural resources, reducing waste and promoting animal welfare’. Vertical agreements that pursue sustainability objectives or contribute to a digital and resilient single market are not exempt from the application of competition rules, therefore they must be assessed on the basis of the principles set out in the Guidelines.

Therefore, the exemption provided for in Article 2(1) of Regulation (EU) 2022/720 applies to vertical agreements that pursue sustainability, resilience and digitization objectives if they meet the conditions laid down in the Regulation. Vertical sustainability agreements are not subject to express exemptions, but they may be subject to individual exemptions in accordance with the provisions of Section 8 of the Guidelines. Companies can invoke the benefit of Article 101(3) TFEU and have the burden of proving that the conditions set out in this provision are met. When it is shown that the agreement may produce anti-competitive effects, undertakings can demonstrate the existence of efficiency gains and set out the reasons why a particular distribution agreement is indispensable to bring likely benefits to consumers without eliminating competition.

For the exception to apply, the vertical agreement must meet the following four cumulative conditions:

- to produce objective economic benefits - an evaluation of the objective benefits reflected by increases in efficiency due to the vertical agreement is required. In the case of this condition, a delimitation must be made between economic benefit and technical progress. Many sustainability agreements will comply with this requirement. For example, if an agreement turns into the productions of a car with the same costs but with much lower carbon emissions, will this condition be considered fulfilled? In our opinion, the Commission's Guidelines should have clarified whether environmental benefits can be considered

‘objective economic benefits’ or indirect economic benefits. Over time, the Commission has appreciated that the improvement of the environment is considered a factor that contributes to the improvement of production or distribution or promoting economic or technical progress.

- a fair share of the benefit must go to consumers - they must at least be compensated for the negative effects of the agreement on prices, production and other relevant factors - environmental benefits benefit society as a whole, not just a small group by consumers. But what do we mean by ‘fair share’ and how can we assess whether it has reached consumers? When assessing whether consumers receive a ‘fair’ share of the benefit, we might consider, for example, that the price paid after the agreement may be closer to the ‘true’ price of the product than before the agreement. [21]. The term "customers" includes potential and/or existing customers of the parties to the agreement.

- the restrictions on competition must be indispensable for obtaining these benefits - the Commission will examine, in particular, whether each restriction allows the production, acquisition or (re)sale of contractual goods or services to be carried out in a more efficient manner than in the absence of the restriction in question. For example, in the case of motor vehicle emissions, the Commission found that the conduct of car manufacturers Daimler, BMW and the Volkswagen group (Volkswagen, Audi and Porsche) was, by its very nature, capable of restricting competition in terms of the characteristics of new diesel car models, regarding AdBlue tank sizes and filling intervals. Smaller AdBlue tanks presented advantages in terms of use, vehicle weight (and therefore fuel consumption and CO2 emissions) and available construction space. Carmakers have conspired to stymie the full potential of a jointly developed technology to limit harmful emissions from diesel cars by signaling to each other that they will not compete to meet stricter car emissions standards than those imposed by the EU. [22]

‘More specifically, Daimler, BMW and Volkswagen group reached an agreement on AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue-consumption. They also exchanged commercially sensitive information on these elements. They thereby removed the uncertainty about their future market conduct concerning NOx-emissions cleaning beyond and above the legal requirements (so called ‘over-fulfilment’) and AdBlue-refill ranges. This means that they restricted competition on product characteristics relevant for the customers.’ [23]

- the agreement must not enable the parties to eliminate competition on a significant part of the market for the goods or services concerned

Also on the same line, the Commission's decision in the case of the biofuels cartel is also included. They can help promote cleaner transport and reduce greenhouse gas emissions and therefore play a key role in the green transition. Abengoa, one of the largest ethanol producers in the EU, coordinated its commercial behavior with other companies on a regular basis with the aim of increasing, maintaining and/or preventing the artificial lowering of benchmark ethanol levels of Platts.

Therefore, it is quite possible that anti-competitive agreements are often hidden behind green initiatives. In these situations, competition regulations must step in and act to prevent or stop them. For example, in the so-called Consumer Detergents case the Commission issued a prohibition decision under Article 101 of the TFEU against three large detergent manufacturers: Henkel, Unilever and Procter & Gamble, which tried to achieve stabilization of the market position, ensuring that none of the companies will use the environmental initiative to gain a competitive advantage over the others and that market positions will remain at the same level as before actions were taken under the environmental initiative (in particular compaction products).

First, they agreed to raise prices indirectly, that is, not to lower prices when the products were ‘compacted’ (*i.e.*, when the weight of the products was reduced), when the quantity of

the products decreased (*i.e.*, when the volume of the product) or when collective reductions in the number of measures (*i.e.*, detergent doses) per package. Second, the three companies agreed to limit their promotional activity, which is also considered a form of collusion on prices. Third, the parties agreed on a direct price increase towards the end of 2004, which targeted specific markets and was to be introduced in order of market position, *i.e.*, the market leader would be the first to introduce the increase, followed by the other undertakings. [24] Therefore, the Commission found that their conduct has the goal of restricting competition.

All the presented cases illustrate how environmental agreements have taken existing competition instruments into account but without further in-depth assessments, often considering environmental benefits to be complementary to economic benefits but without quantifying them.

### **3.2 Horizontal agreements**

With regard to horizontal agreements, the Commission approved on March 1, 2022 the content of the Commission's Communication Draft – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements[25]. It should be noted that the document regulates, in addition to the most common types of horizontal cooperation agreements, those that pursue sustainability objectives, dedicating them an entire chapter (Chapter 9). The current horizontal guidelines that have been applied since 2011 are set to expire on 31 December 2022, and from 1 January 2023 the new horizontal guidelines will enter into force.

By sustainability agreements we must understand any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, regardless of the form of cooperation. Raise competition concerns under Article 101(1) TFEU only if they involve serious restrictions of competition in the form of restrictions by object or if they produce significant adverse effects on competition contrary to Article 101(1) TFEU. The notion of „sustainability” should be understood in a broad sense, including addressing climate change, eliminating pollution, limiting the use of natural resources, respecting human rights, promoting resilient infrastructure and innovation, reducing food waste, facilitating the transition to healthy and nutritious food, ensuring animal welfare etc.

The guidelines make it clear that agreements which pursue sustainability goals are not distinct types of cooperation agreements. In addition, if a sustainability agreement relates to a specific type of cooperation as defined in other chapters, then its assessment will be governed by those legal provisions.

In principle, sustainability standardization agreements have positive effects on competition, for the most part, but there may also be situations where they can lead to the restriction of competition by coordinating prices, excluding alternative standards and excluding or discriminating against certain competitors.

The Commission identifies three types of sustainability agreements that do not fall under Article 101, namely:

- the agreements that refer to the internal behavior of these enterprises;
- agreements on the creation of a database containing information on suppliers that have sustainable value chains, use sustainable production processes and supply sustainable production factors, or on distributors that sell products sustainably, but do not require the parties to purchase from those suppliers or sell to those distributors;
- agreements between competitors regarding the organization of sector-wide awareness campaigns or customer awareness campaigns regarding the environmental footprint of their consumption, but which do not constitute joint advertising for certain products.

However, a sustainability agreement in breach of Article 101(1) TFEU may be exempted under Article 101(3) TFEU if four cumulative conditions are met, namely:

- increasing efficiency, in the sense that the agreement contributes to the improvement of production, distribution of products or to the promotion of technical or economic progress;
- indispensability: the parties must prove that all restrictions are necessary to obtain the benefits;
- a fair share of the benefits of the agreement to reach consumers, more specifically to all direct or indirect users of the products that are the subject of the agreement;
- maintaining a certain degree of competition on the market covered by the agreement.

Consumer benefits can be individual or collective. Individual benefits can be related to use value or non-use value. Individual value-in-use benefits are those that improve the consumer's experience with the product in question and can materialize in improved quality, product diversification, lower prices, etc. Individual benefits related to non-use value are indirect benefits arising from consumers' appreciation of the environmental impact of their sustainable consumption. These refer to the voluntary and altruistic choices of consumers. For example, consumers may prefer a particular car simply because it pollutes less. These indirect benefits of non-use can be measured by surveys that show that customers are willing to pay more for these benefits. In any event, the parties to an agreement must provide convincing evidence demonstrating actual consumer preferences.

In the case of collective benefits, they can be materialized only through a collective action. For example, not all consumers may be willing to pay a higher price for a car that does not pollute the environment; but if only electric cars were to be manufactured, as a result of an agreement to phase out the polluting technology, the benefits would be felt by all consumers in that relevant market. The Commission points out that a distinction must be made here between consumers and citizens, *i.e.* when the sustainability benefits (of cleaner air in this case) are significant enough to compensate consumers in the relevant market for the harm suffered, the agreement may be exempted under Article 101(3) TFEU. In these situations, the parties to the agreement must prove that the clearly described benefits have already occurred or are likely to occur; to clearly define the beneficiaries; demonstrate that consumers in the relevant market substantially overlap with or are part of the beneficiaries and demonstrate the extent to which collective benefits occurring or likely to occur outside the relevant market will be felt by consumers of the product in the relevant market .

## **4 Economic mergers**

Sustainability and climate change issues can and should be taken into account by the Commission in its merger assessment. Article 2(1) of the Merger Regulation (EC) No 139/2004 sets out the criteria that the Commission must take into account when deciding whether or not to approve a concentration. These criteria include, *inter alia*, 'the development of technical and economic progress, provided that this is to the advantage of consumers and does not constitute an obstacle to competition' [Article 2(1)(b)].

At the end of March 2021, the Commission published a Communication [26] through which it provided a series of guidelines on the application of the referral mechanism provided for in Article 22 of the Regulation on economic concentrations to certain categories of cases. Article 22 of the Merger Regulation of one or more Member States to require the Commission to examine, for those Member States, any concentration which is not EU-wide, but which affects trade between States and threatens to significantly affect competition in the territory. the requesting Member State or States. Although the Commission's recent policy has been to discourage referral requests from Member States, market developments, particularly in the digital economy or others where innovation is an important competitive parameter, have generated transactions involving innovative companies carrying out projects. research and development and with a strong competitive potential [27].

This situation will include all the causes where the turnover of at least one of the enterprises involved in the transaction does not reflect its current or future competitive potential and would include, for example, a new enterprise or a new entrant with a significant competitive potential that does not have yet developed or implemented a business model that generates significant revenue, a major innovator, or conducts major potential research [28]. This could also include companies whose main activity is environmental protection or sustainability and which notify the competition authorities or the possibility of a merger or safety. In their case, no specific economic value can be assigned. On the other hand, the Commission will have to take into account the environmental impact of an agreement. For example, the Commission approved, with certain conditions, in the Suez area by Veolia. The 2 companies operate in the water treatment and waste management sectors and offer a wide range of municipal and industrial services. As a result of the concentration, the Commission concluded that it would have been faced with a reduced range of service solutions, with no real bargaining power. To meet the tasks, Veolia has offered a package of commitments that includes the divestiture of almost all of Suez's French non-hazardous and regulated waste management activities and municipal water management activities to a newly created entity called 'New Suez'. Veolia is further committed to divest the mobile water services activities in the EEA, almost all of its industrial water management activities in France and part of the hazardous waste activities of Veolia and Suez.

In another case, Bayer/Monsanto [29], the Commission considered that it does not analyze environmental and climate risks in a merger, although there was widespread opposition to the agreement between the two companies from NGOs environmentalists and a wider public, based on concerns about the environment and climate change. In the Commission's "Monsanto/Bayer Letter" to the petitioners, Commissioner Vestager responded that "while these concerns are of great importance, they do not form the basis of a merger review," arguing that such concerns "are handled by my colleagues and the authorities national and are subject to European and national rules to protect food safety, consumers, the environment and the climate". [30] Specialists in the field of competition have criticized this position, in light of the fact that it is contrary to the provisions of art. 2 of the Regulation on economic concentrations. [31]

Later, in the Aurubis/Metallo case [32] Margarethe Vestager stated that: *„a well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal. This is why we carried out an in-depth investigation of the merger between Aurubis and Metallo”*. One of the important aspects brought to the attention of the Commission in this case was “greening of competition policy”.

Aurubis, based in Germany, is a worldwide provider of non-ferrous metals and the largest integrated European copper producer. Aurubis processes copper concentrates and copper scrap and produces copper cathodes and by-products of the copper refining process. The company also supplies copper shapes and semi-finished copper as well as copper alloy products such as flat rolled, bars, rods and wires. Metallo, based in Belgium, is active in the recycling, processing and trading of non-ferrous metals. In particular, Metallo refines copper scrap to produce copper anodes, copper cathodes, tin, lead and other by-products of the refining process.

In conclusion, we can see that merger control could become one of the most effective ways that competition policy has to promote the sustainability objectives established in the Green Deal, which would stimulate the European transition towards a greener economy.

## 5 Conclusions

Through the European Ecological Pact, the European Commission announced its intention to lead the competition provisions on the sustainability line. The efforts of the competition

authorities in the member states to update their work agenda with legislative proposals based on ecological policies also follow the same direction. In this sense, we welcome the steps taken by the national competition authority in the Netherlands — Autoriteit Consument & Markt, ACM, which launched the proposal that competition assessments should focus, in the future, on the benefits for society as a whole and not only on those of to a certain group of consumers in that market.

For their part, private companies have begun to give signals that they will support these efforts either through individual or collective actions. However, companies sometimes claim that the collective initiatives they would like to undertake are prevented by competition rules. It is therefore necessary to adapt the competition rules so that the interests of society can be taken into account when assessing cooperation between firms.

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