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State of play on the transposition of Directive 2011/7/EU on late payments in commercial transactions

This briefing, produced by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service (EPRS), aims to present an initial overview of the state of transposition of Directive 2011/7/EU on late payments in commercial transactions. It has been drafted for the Internal Market and Consumer Protection (IMCO) Committee's first "scrutiny session" with the European Commission, on 23rd June 2015, focussing on this directive. Where available, an analysis on implementation and on the operation in practice of EU law on late payments has also been provided.

Background

The most up-to-date EU instrument which aims to tackle the problem of late payments in commercial transactions is Directive 2011/7/EU (recast). This Directive committed EU Member States to give effect to its provisions in their national laws by the 16th of March 2013, date on which it replaced the original Directive 2000/35/EC, which featured the same objectives and basic operating principles. As of April 2015, the 2011 Directive had reportedly[1] been correctly transposed by only 21 of the 28 Member States, despite the deadline having passed over two years hitherto.

Although the 2011 directive is not due for a review as such, the Commission is required, by 16 March 2016, to submit a report to the European Parliament and the Council on the implementation of this Directive, accompanied by any appropriate proposals. Accordingly, DG GROW has engaged consultants to gather information from Member States relating to implementation and to publish a study, and in parallel, launched a country survey online on 8th June 2015.

The exact size of the economic impact of late payments in the EU is hard to ascertain because implementation of the 2011 Directive is still ongoing, and also because of the variable effects according to the specific situation (e.g. national credit conditions, economic sectors, payment delay periods, ongoing adaptations to a number of Member State practices). Survey results are however clear on the detrimental impact of late payments on business, in particular on small and medium sized enterprises (SMEs).

To address this, EU policy highlights the need to tackle as a priority payment delays by public administrations given the importance of public procurement in the EU, representing more than €1,9trillion per year at the time of the proposal. The executive summary of the Commission's impact assessment for the 2011 Directive notably stressed how *"late payments by public bodies undermine the creation of stable and predictable economic conditions for businesses and policies to drive growth and employment."* More recently (September 2014), the European Commission Economic Paper on Late Payments, reveals that *"the estimated implicit financial costs associated with payment delays by public administrations observed in 2012 ranged from 0.005% of GDP in Finland to 0.19% of GDP in Greece"*. Furthermore, a 2015 IMF Working

[1] Alina Gîrbea, *The implementation of the Directive 2011/7/EU on late payment: A contribution from the European civil society,* European Economic and Social Committee Section for the Single Market, Production and Consumption, 09/06/2015, p.1

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Paper demonstrates, inter alia, that *"a standard deviation increase in delayed* (government) *payments reduces profit growth by 1.5 to 3.4 percentage points"*.

Finally, perhaps the most poignant example of the scale of the problem was recorded in Intrum Justitia's European Payment Index 2012 survey, which identified that written-off debt owing to the non-payment of invoices in the EU had grown to at least 2.8% of total receivables to reach €340billion, equivalent to the total debt of Greece.

Strengthened rules

The new 2011 directive's objective is to tighten EU regulation on late payments to ensure that businesses, in particular SMEs, benefit from strengthened rights for receiving payment owed by public sector or private debtors. It places stricter requirements on public sector debtors to process their accounts payable within 30 days (with an extension to 60 days in exceptional circumstances), and within 60 days for private sector debtors. Furthermore, the new directive introduces a minimum debt-recovery processing compensation of €40 on public sector bodies and businesses failing to meet their accounts payable within these deadlines, and increases interest penalties. These interest rates are pegged to the rate set by the European Central Bank adding a mandatory 8 percentage points to the base rate (up from 7 points in the 2000 Directive).

Thus, the new directive reinforces the credit policies of EU enterprises, in particular of providers to the public sector or to large corporations, typically SMEs and subcontractors, ensuring greater protection of SME revenue and generally minimising instances of creditors being forced to write-off any accounts receivable as bad debts. Directive 2011/7/EU on late payments was also designed to harmonise late payment regulations across the European Union, including in the newer Member States, many of which had unsatisfactory late payment laws prior to accession. It also provided for the integration of the late payment recovery process across Member States, allowing an enterprise to successfully pursue a debt in another Member State in the same manner as they would in their resident Member State.

Heightened impacts of late payments in the wake of the credit crunch

Late payments are most likely to affect SMEs and subcontractors. Their short-term operating costs depend upon safeguarding a healthy credit policy. A disproportionate level of accounts payable can have a hard impact on a small to medium-sized enterprise.

Business owners surveyed during a previous consultation claimed that they are often forced to resort to making staff redundant if they do not receive their payments on time, and that they would be able to sustain higher employment levels and innovation in a culture of prompt payment[2]. It has also been reported that late payments have become far more damaging in the wake of the financial crisis, with banks having slashed credit conditions, in particular SME overdraft facilities, often resulting in severe cash flow difficulties for the smaller firms leading to a rise in the number of bankruptcies. It has also been suggested that offenders are more likely to be large corporations and public authorities, with the latter considered as the worst offenders[3]. And finally, it is regularly argued that austerity measures in certain Member States have meant that late payments by public bodies have become a common occurrence. However, evidence also suggests that this problem predates the global financial crisis.

[2] Ibid.
[3] Ibid.

Scrutiny of transposition and initial feedback on implementation problems

The table below is based on an initial ad hoc survey of Member States carried out by DG EPRS in June 2015 (to be finalised by mid-July 2015), to identify national measures transposing the directive, and an overview of reported problems encountered with transposition and implementation of the 2011 late payments directive. The traffic light colour codes relate solely to the state of play on transposition, not to the effects of the legislation in practice (evaluation), where there may be a number of additional implementation problems in Member States which have correctly transposed the 2011 late payments directive.

Difficulties in transposition persist, notably in Greece, but also in Italy and Spain. A possible correlation exists between administrative burdens or national debt refinancing problems and late payments. A small number of resolved transposition problems also relate to adapting existing national laws to the strengthened rules, and pressure to go beyond the scope of the directive to provide for additional protections for specific vulnerable sectors. The real test on implementation is whether the expected gains laid down in the objectives of the 2011 directive have been realised, and here it is worrying that despite the correct and complete transposition of this directive in a number of Member States with longstanding policies and laws to curb late payments in commercial transactions, persistent problems remain, which tends to indicate that its impact may well be more limited than originally foreseen.

Member State	**National measures transposing Directive 2011/7/EU on late payments in commercial transactions** **Overview of transposition and reported implementation problems**
Austria	Austria transposed the 2011 late payments directive into national legislation (Artikel 9). Furthermore, in Austria, the KSV credit organization ran a survey and found that 73% of all business clients fulfil their payment obligations in the agreed period of time and that the average time of late payment for public contracts is 7 days (down from 11 days in 2012), consistent with the September 2014 Commission Economic Paper on Late Payments data, which shows that Austria ranks among the Member States with the shortest payment durations and delays.
Belgium	Belgium transposed the 2011 Late Payments Directive into its national law on 22 November 2013. This law applies retroactively back to the transposition deadline of 16 March 2013, except for specific measures relating to general provisions of Belgian public procurement legislation in the case of a commercial transaction between an enterprise and a public body. For this, entry into force coincides with that of the Royal Decree of 14 January 2013 on public procurement and public works concessions i.e. on 1st July 2013. See the consolidated version of the original Act of 2 August 2002 with the modifications inserted by the Act of 22 November 2013. Reportedly, there weren't any major difficulties in the process of transposing the Directive, apart from Belgium-specific minor problems that are inherent to the political process of law-making. Also there have been no reported difficulties concerning the application of the Directive. An information campaign day was organized in June 2014 by the EU Commission to raise awareness of the new rules amongst Belgian entrepreneurs, policy makers from national and regional authorities, business associations and SMEs.
Bulgaria	The requirements of the 2011 late payments directive have been transposed by changes to the Bulgarian Commercial Law Act. The amendments were published in the Official journal on 28 February 2013 and entered into force on 4 March 2013. However late payments remains a significant problem for businesses in Bulgaria. February 2015 estimations of the Bulgarian Industrial Association (member of Business Europe) show that in 2013, the debts between companies in general (incl. rate of late payments) have continued to increase reaching BGN117billion (around €59billion), especially in the trade, transport, tourism, and energy sectors. This is an increase of 1,9% compared to 2012, and 8,3% compared to 2010. Again, for 2013, the late payments of public (central and local) authorities to business amount to BGN277million (around €140million), with late payments by local authorities representing a bigger share. Anecdotal evidence suggests that, owing to the significant number of business-to-business grey economy transactions, creditors cannot rely on the justice system to execute late payments, and for public sector to business transactions, there are frequently reported problems with budgetary execution at the local level, namely with local authorities running out of funds before the end of the financial year.

Member State	National measures transposing Directive 2011/7/EU on late payments in commercial transactions Overview of transposition and reported implementation problems
Croatia	The 2011 late payments directive has been transposed by the Croatian Financial Operations and Pre-Bankruptcy Settlement Act *"Zakon o financijskom poslovanju i predstečajnoj nagodbi"*, which entered into force on 1 st October 2012. Research is still ongoing to ascertain the extent of any implementation problems.
Cyprus	Cyprus claims to be the first Member States to have transposed the late payments directive into its national laws, on 27 July 2012. Research is still ongoing to ascertain the extent of any implementation problems although Cyprus remains one of the Member State with comparatively longer average payment delays, as reported in the September 2014 Commission Economic Paper on Late Payments.
Czech Republic	The Czech republic has transposed the 2011 late payments directive into national legislation (paragraph 61), specifically into Civil Code Act No 89/2012 Sb. The statutory interest rate for late payment and the compensation for recovery costs are regulated in Government Decree No 351/2013 Sb, sections 2 and 3. There were no reported difficulties associated with transposition, nor with the application of the Directive in the Czech Republic. Unconfirmed reports and figures based on private sector research present data showing marginal improvements in the average contractual period and the percentage of payments made within 30 days between 2012 and 2014 with the problem of late payments improving overall although payments in the public health sector remain more problematic. Furthermore, it is likely that the threat of damaging business relations with government has limited the use of recovery procedures introduced by the Directive. Finally, there is some anecdotal evidence of Czech SMEs being discouraged from court recovery proceedings owing to the costs and length of the legal process.
Denmark	The 2011 late payments directive was transposed through amendment no. 1244 of 18 December 2012 to the Danish Interest Act. The amendment entered into force on 1 March 2013. The bill to the amendment was the subject of a report on the transposition. Under Danish law, the maximum payment term for businesses is 30 days from the date on which the creditor has sent the invoice or made an equivalent request for payment. Parties in the contract may agree on an extended period provided that two conditions are met: The extended payment period shall be expressly approved by the creditor, and the extended payment period shall not be unfair to the creditor. The maximum payment term for public authorities is set at 30 days from the date on which the creditor has sent the invoice or made an equivalent request for payment and can be extended to up to 60 days by executive order. So far, no such order has been issued. As regards the monitoring of implementation, the Danish Ministry of Finance has issued an administrative order relating to transparency measures for late payments by public authorities, which recently came into force.
Estonia	Estonia has transposed the 2011 late payments directive into its Law of Obligations Act and its Code of Civil Procedure Research is still ongoing to ascertain the extent of any implementation problems, however Estonia ranks amongst the Member States featuring the shortest payment durations and delays for public sector to business transactions, as evidenced in the September 2014 Commission Economic Paper on Late Payments.
Finland	Finland has transposed the 2011 late payments directive into its national legislation. Its regulations on late payments predated the 2011 late payments directive and are amongst the strictest in Europe. As evidenced in the September 2014 Commission Economic Paper on Late Payments the average payment duration in Finland is the shortest in the EU for government to business payments. However, there have been signs of payment timescales lengthening, particularly in the industrial sector. Therefore, the Finnish Parliament has recently amended the Act of Payment Terms in Commercial Relations so that the period for payment fixed in the contract may now not exceed 30 days (down from 60 days), unless otherwise expressly stated in the contract.

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France	France finalised its transposition of the 2011 Late Payments Directive into its national legislation in 2012 with decree No. 2013-269 of 29 March 2013 on combatting late payments in public contracts covering the application of law No. 2013-100 of 28th January 2013 adapting national law to the provisions of the 2011 directive, and in particular, extending the scope of previous national regulation to all public sector contracting authorities. Furthermore, to improve implementation, a number of national targets have been set, notably to reduce the average payment delays by state bodies to 20 days by 2017, and on mandating e-invoicing for large enterprises by 2017 and for all firms, including micro-enterprises, by 2020. The Ministry of Finance performs around 2000 checks per year, which has revealed a downward trend in late payments.
Germany	Germany transposed the 2011 late payments directive with a slight delay owing to difficulties reconciling the instrument with predating national law on unfair contract conditions. However, the directive has now been transposed by the "Gesetz zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr und zur Änderung des Erneuerbare-Energien-Gesetzes". Furthermore, Germany has given greater protections to creditors than those mandated by the 2011 late payments directive, pursuant to pressure from the crafts industry. There was a debate in the German Bundestag about whether or not national law which addresses the problem of late payments from the angle of unfair contract conditions actually needed to be updated at all in light of the 2011 late payments directive. Infringement proceedings owing to late transposition were brought by the Commission against Germany, but the German government complied, and these proceedings have since been closed.
Greece	Greece transposed the 2011 late payments directive into Greek law (Paragraph Z). However, according to the Commission paper on the economic impact of late payments (September 2014), the Commission has launched infringement proceedings against Greece for its failure to transpose the 2011 late payments directive correctly, in particular given that the national transposition law does not guarantee that an enforceable title for unchallenged claims can be obtained within 90 calendar days. In addition, a separate law still in force states that an enforceable title cannot be used in Court against public administrations and bodies governed by public law. In any case, it is likely that any future transposition will be linked to a positive outcome in Greece's ongoing negotiations with the Eurogroup on restructuring its debt repayment package. Late payments in commercial transactions are a longstanding problem in Greece, and have only been aggravated in the current economic climate. Payment procedures in Greece are historically very slow. In particular Eurochambres has previously reported that the average length of payment by Greek public administrations to SMEs was amongst the highest in the EU, with an average delay of 155 days. However, Greek authorities have adopted new measures which have shifted the responsibility for payment execution from taxation authorities to fiscal audit offices with the objective of streamlining the process.
Hungary	Hungary has transposed the 2011 late payments directive into national legislation (paragraph 48). Research is still ongoing to ascertain the extent of any implementation problems.
Ireland	In 2012, Ireland transposed the 2011 Late Payments Directive by reference into national regulations. The Department of Jobs, Enterprise and Innovation promotes improved payment practices and monitors the operation of the Prompt Payment of Accounts Act, 1997, and the Late Payment in Commercial Transactions 2012. The Department also collates and publishes the composite quarterly returns by central Government Departments of payments made to their suppliers within 15 days. Data published by the Irish government indicates that, over the past two years, central Government Departments paid 84% of all invoices within 15 days (92% in value terms). Ireland is currently examining the possibility of incorporating the 15 Day Commitment (administrative arrangement under government decision) into national legislation. Furthermore, Ireland has introduced various initiatives including, in particular, a Prompt Payment Code, and is also following up the national late payment campaign with a closer focus on problems experienced at the regional level. The Government has also committed to establishing 'Payment Forum' under the Action Plan for Jobs 2015.

Member State	National measures transposing Directive 2011/7/EU on late payments in commercial transactions Overview of transposition and reported implementation problems
Italy	The main act transposing the late payments directive into Italian national law is the law of the Decreto Legislativo 9 novembre 2012, n. 192. However the European Commission has launched infringement proceedings against Italy, seeking clarification on their application and implementation of the EU's Late Payments Directive. The reason for the infringement was due to a loophole in Italian law, which has now been closed. This allowed public authorities to neglect to pay their bills for contracts to which they had agreed. For the transposition process, funds had to be redistributed from the national treasury to town halls and regional authorities in order to pay money owed because of this problem. In order to effectively transpose the 2011 late payments directive, new rules for transparency and penalties were introduced, which added to the penalties stated in the directive. In order to improve transparency, public authorities are now required to publish all bills which they owe onto a government website. The new penalties include the blocking of all new staff recruitment for public authorities which do not meet their payments, and the official responsible is held personally civilly and criminally liable. Furthermore, the Commission paper on the economic impact of late payments (September 2014) explains that the Italian government introduced compulsory electronic invoices for central government administrations in mid-2014 and plans to extend them to local governments by spring 2015 with the objective of speeding up payments to suppliers. Moreover, to increase transparency, the related data will be published online. The Commission's paper also notes that the Italian government has also set up a €66 billion programme to clear arrears over two years, and that, by October 2014, €32.5 billion had already been paid out. The real implementation test of these corrective actions will be whether Italy can reduce average payment delays: According to Eurochambres in 2014, the average length of payment by public administrations to SMEs was 165 days.
Latvia	Latvia has transposed the 2011 late payments Directive into Latvian law. Research is still ongoing to ascertain the extent of any implementation problems.
Lithuania	The main act transposing the 2011 late payments directive into Lithuanian national law is called the law on prevention of late payments in commercial transactions. The 2011 late payments directive was also transposed by the law on payment for agriculture products (Art. 5, 6, 7, 11, 12, 13). A survey on payment delays in the public and private sectors was carried out in October 2014. 70% of respondents said that most payments are made on time in the public sector, as is the case for 63% of payments in the private sector. For both the public and the private sectors, 30% of debts are paid before 60 days and 70% of debts are settled after 60 days. There are reports of frequent clarifications requested by public bodies in relation to extending payments from 30 to 60 days, where procurement officers are calling for clarity on the interpretation of the *"particular nature or features of the contract"* as a justification for the extension.
Luxembourg	Luxembourg transposed the 2011 late payments directive into national law on 29 March 2013. However, there are reports that businesses in Luxembourg have little awareness of the Directive and of the rights it confers, and most stakeholders believe that payment is only required after one month, or pursuant to the receipt of a first reminder.
Malta	The 2011 late payments directive was transposed into the Maltese law through Legal Notice 272 published on 14 August 2012. The transposition forms part of the Commercial Code (Chapter 13 of the Laws of Malta). Further legal amendments were carried out following initial transposition and full transposition was completed through Legal Notice 13 published on 17th January 2014. This transposition also forms part of the Commercial Code (Chapter 13 of the Laws of Malta). Malta did not face any significant issues with transposition. The problems faced were expected: Paying on time requires a change in culture and consequently the main problem faced was creating awareness on the implications of the Directive and the importance of paying on time. In this regard, in 2012, the Maltese government conducted three information seminars targeted at government departments, public entities and local councils (i.e. all public authorities) which specifically dealt with the topic. In addition, the Malta Association of Credit Management (sponsored by the European Commission Representation in Malta) organised an information session on the subject on 14th February 2013, which was directed at the business community. During 2012, the Ministry for Finance also issued an internal circular explaining the main elements of the transposed directive. Two additional presentations were delivered to public authorities and to SMEs during 2014. Furthermore, the Maltese government has launched website on the subject www.late-payment.gov.mt, which includes a list of frequently asked questions and the applicable legal interest rate for late payment. On a semi-annual basis (January and July) Maltese authorities collect creditor data from all public authorities to understand better the extent of the problem and trends.

Member State	National measures transposing Directive 2011/7/EU on late payments in commercial transactions Overview of transposition and reported implementation problems
The Netherlands	The Dutch government transposed the relevant parts of the 2011 late payments directive into national law on public procurement in 2014. Dutch implementation of the late payments directive also goes beyond the scope of the directive, covering in addition business to consumer transactions, an extension to the scope which has also been considered in the margins of the final negotiations between the co-legislators on the 2011 directive as worthy of consideration when reviewing the scope of the EU directive in a future revision. There are reports of a heightened public interest on combatting late payments with unofficial surveys revealing that business to business transactions payment delays could well be improved. In terms of additional soft implementing measures, a Prompt Payment Charter is in the process of being drafted.
Poland	The text which transposes the late payments directive into Polish law is: "Ustawa z dnia 8 marca 2013 r. o terminach zapłaty w transakcjach handlowych". According to a survey by the National Debt Register (KRD) in 2012, which was reported on by the Enterprise Europe Network, 91.1% of Polish companies face late payments or even non-payments. As a result, about 35% had failed to fulfill their own financial obligations to other parties, incurring reputational damage. Almost twice as many businesses have reduced investment levels, which is considered to be particularly damaging for the economy. Other studies show that 2012 was the worst year for the number of bankruptcies filed in Poland over an 8 year period. The main reason was worsening payment backlogs. Most bankruptcies were recorded in the construction sector. A deterioration was also visible in the retail and manufacturing sectors. As regards transposition problems, these reportedly resulted from the absence of a harmonized approach to the calculation of interest in civil law. In particular, there was a risk of computing a lower interest than required by the directive. Polish authorities also had to adjust the existing act after transposing the 2011 directive, given some interpretation problems linked to existing Polish provisions relating to the compensation for recovery costs (art. 6 of the 2011 directive).
Portugal	The instrument transposing the 2011 late payments directive into Portuguese law is decreto-lei = DL 62/2013 of 10 May 2013. Despite the introduction of this law, it has been reported that a high risk of late payments subsists in Portugal with an average length of payment by public administrations to SMEs reported of 129 days.
Romania	Romania has transposed the 2011 late payments directive into national law with Legea 72/2013. However Eurochambres had previously reported on a high risk of late payment in Romania, with media reports of particularly acute problems as regards public sector to business transactions.
Spain	The instrument transposing the 2011 late payments directive into Spanish law is Real Decreto-ley 4/2013. In response to a written question (ES version) tabled by Ramón Tremosa i Balcells MEP (ALDE), the Commission responded in January 2014 that, as regards the Spanish transposition instrument, the Commission was verifying compliance with the new directive. However, the Commission has since launched infringement proceedings against Spain for incorrect implementation. Additional information will be provided in the 15th July update of this note. Spain is reportedly beset by a high risk of late payments with the average length of payment by public administrations to SMEs standing at 154 days. However, it has been noted in the Commission paper on the economic impact of late payments (September 2014) that Spain announced in May 2012 a mechanism in the form of a government guaranteed syndicated loan worth €30 billion by which the central government helps regional and local governments clear their arrears, with the effect of accelerating payments to suppliers.
Slovakia	The European Commission launched infringement proceedings against Slovakia, seeking clarification on their application and implementation of the EU's late payments directive. The infringement was rectified and the proceedings were closed on 15 March 2015. Slovakian SMEs reportedly welcomed the transposition of the 2011 Directive although the impact is perceived as limited owing to similar rules already being in place hitherto.
Slovenia	Slovenia has transposed the 2011 late payments directive in to national law. Research is still ongoing to ascertain the extent of any implementation problems.

Member State	National measures transposing Directive 2011/7/EU on late payments in commercial transactions Overview of transposition and reported implementation problems
Sweden	The 2011 late payments directive was transposed into Swedish legislation under Section 2 a-c, 4 a and 6 of the Interest Act (1975:635), section 4 a, 5 and 6 of the Act (1981:739) on compensation for recovery costs, the Act (1984:292) on contract terms between undertakings and section 36 of the Contracts Act (1915:218). For further information see prop 2012/13:36 The transposition and implementation of the 2011 directive did not have a significant impact in Sweden because national legislation already contained strict measures to limit payment delays. As evidenced in the September 2014 Commission Economic Paper on Late Payments, Sweden's public sector to business average payment duration features amongst the shorter EU averages (27-28 days).
United Kingdom	Specific EU legislative measures targeting late payments in commercial transactions were likely inspired by those contained in the United Kingdom Late Payments of Commercial Debts (Interest) Act of 1998. This act, according to the UK, was the first dedicated piece of legislation on late payments to be introduced by a Member State targeting debtors in order to foster a culture of prompt payment by public bodies and large enterprises. Accordingly, the UK transposed the 2011 late payments directive in to national law without problems since many of its provisions already featured in UK law. Reported practice suggests however that application is not perfect. The Independent newspaper reported in particular that the Prompt Payment Code, created by former UK Business Minister to ensure that businesses settle their payments on time, has been deemed to be inadequate by the UK Federation of Small Businesses (FSB). The argument is that there is no sanction for businesses which do not comply with the code and that for businesses which make late payments without penalties, there is little incentive to pay on time, as a penalty-free late payment acts de-facto as an interest free loan, giving large companies a competitive advantage over smaller companies, and creating a situation in which free competition is distorted. Furthermore, the cost for recovery of a late payment in a small-claims court outweighs the amount of the outstanding payment, meaning that the debt-pursuit process is prohibitive for many SMEs.

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