Brussels, 20th November 2020

COMPETITION POLICY AND THE GREEN DEAL

To: COMP-GREEN-DEAL@ec.europa.eu

ALLRAIL, the Alliance of Passenger Rail New Entrants in Europe, represents independent passenger rail companies - railway operators and ticket vendors. We promote competition in the passenger rail market, aiming for EU regulatory environment for innovative & attractive rail services. ALLRAIL seeks market opening policies which will ensure that passenger rail becomes a crucial part of the EU Green Deal, acting in a fast & effective manner to achieve modal shift.

INTRODUCTION:

The goal for Europe is to be the first climate neutral continent by 2050. The European Green Deal should facilitate and support the transition towards a green economy.

Transportation represents almost a quarter of Europe's greenhouse gas emissions. The transport sector has not seen the same gradual decline in emissions as other sectors. On the contrary, transportation still remains the only sector with an increase in emissions.

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In 2017, 27 % of total EU-28 greenhouse gas emissions came from the transport sector (22 % if international aviation and maritime emissions are excluded). CO2 emissions from transport increased by 2.2 % compared with 2016.[1]

Passenger rail as one of the most sustainable means of passenger transport represents has a very small market share compared to the private individual motor car. After all, railways had experienced a steady decline – that is, until the opening of the market to competition.

If Europe wants to achieve its ambitious Green Deal goals, it has to focus on transport, and it has to focus on rail. This focus has to be aimed at more competition as the top priority, followed by investments and non-financial initiatives. Investments and initiatives are essential, but the invested efforts and resources will fall flat without enforcing competition in passenger rail first.

Competition policy is a green policy – especially in passenger rail

ALLRAIL seeks fair competition, non-discriminatory conditions and market opening in passenger rail. It is only by allowing real competition that the passenger rail sector will become more innovative and attractive compared to other less sustainable modes of transport. In the limited cases where rail market opening has already occurred, the results have brought about better quality, reduced fares, new jobs, greater efficiency and modal shift to rail, which is good for the environment.

[1] https://www.eea.europa.eu/data-and-maps/indicators/transport-emissions-of-greenhouse-gases/transport-emissions-of-greenhouse-gases-12

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Rail has to receive preferential treatment vis-à-vis other more polluting modes of transport. But at the same time, it has to ensure competition in passenger rail in order to make travellers want to shift to rail in line with the EU Green Deal objectives.

It was the absence of competition that made passenger rail weak compared to other modes of transport. The Communication from the Commission: Community guidelines on State aid for railway undertakings (2008/C 184/07) (Railway Guidelines from 2008) clearly states that the historical organisation of the railways blocked competition and its positive effects for passengers and environment: "*The relative decline in Europe's railway industry is largely due to the way transport supply has been organised historically, essentially on national and monopolistic lines.*" (2008 Railway Guidelines, 1.1., Art. 5), "*in the absence of competition on the national networks, railway undertakings had no incentive to reduce their operating costs and develop new services*" (2008 Railway Guidelines, 1.1., Art. 6).

Starting around the turn of the millennium, national monopolistic structures have been challenged by new independent passenger rail companies, both railway operators and ticket vendors - with convincing results when it came to increasing passenger numbers, multimodality, innovation and modal shift to rail.

New independent services also brought about the **emergence of private investment** - for the first time in decades.

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Banks and private investors are interested in the rail sector. Yet they observe that private players are not being treated in a non-discriminatory manner and that Member States principally support their subsidiary railway companies (the support is now even more evident during current pandemic situation). Discrimination against independent passenger rail companies remains a big problem, frightening away desperately needed private investment from the sector.

All operators and ticket vendors must have the same access as incumbents to the basic infrastructure of the sector. That means: rolling stock, maintenance facilities, data and ticket distribution systems. If this is not ensured, then any private investment in the sector will be severely threatened. This threat becomes even more acute during the current pandemic in EU Member States that give preferential COVID-19 to state-owned rail incumbents. **Public money risks crowding out private investment.**

In the case of passenger transport and passenger rail in particular, competition policy must be in the lead. Competition rules – on both the State Aid and the Antitrust level - have to be followed, especially by the Member States, and enforced.

Compared to other modes transport, passenger rail is still system-oriented rather than passenger oriented. The regulation is many aspects (taxation etc.) prevents passenger rail from being more competitive intermodally. One of the examples is launching a new service in aviation and passenger rail. According

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the EU legislation for launching a new service (Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018) the operator has to announce new service latest 18 months in advance before the start of the new service. **In aviation, booking a slot and start of operations is an incomparably faster process. The conditions for launching new service have to be similar.**

ALLRAIL presented the Green Deal priorities on our website www.allrail.eu in February 2020. In this contribution, we are not covering the passenger rail topics in detail, but we are happy to provide further detail to the policies.

1. Open Rail Data & Through Ticketing – link
2. Fair access to track infrastructure – link
3. Fair access to rolling stock - link
4. Attractive & & efficient cross-border night train network - link

We also enclose an updated overview of passenger rail policies and the measures to be taken for the successful Green Deal we presented and submitted to Executive Vice-President Timmermans. Please find this summary in the end of this contribution.

1. STATE AID CONTROL

The State Aid and State aid regulation and the State Aid control are essential in achieving Green Deal goals, especially in the passenger rail.

Clear state aid rules - and most importantly their enforcement by the European Commission - are imperative. After all, EU Member States are in a complicated, almost contradictory, position:

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- on the one hand, the Member States are responsible for **transposing and implementing the legislation and enforcing the rules,**

- they are also in the role of the rail competent authority responsible for transport plan or an awarding / tendering process

- they are also in the role of **a shareholder of the incumbent**

One of the biggest obstacles in opening-up the passenger rail market has been these overlapping and contradictory roles of the EU Member States. Despite the objective of gradual opening up the market, Member States often act (simultaneously) as shareholders. This has been evident also for example in the Transition period of the Fourth Railway package when many Member States have been directly awarding PSOs for a maximum length of the contract to the incumbents without any market consultation or further analysis of the market (that should also be reflected in the transportation plan); it is also evident in the current situation after COVID-19 when relief measures for the rail sector have been in several cases targeted towards the state-owned incumbents (for example in the proposed equity increase for DB).

The role of the EU Member States also defines the antitrust situation and how the antirust conditions are enforced.

The basic principles in the articles 107 and 108 of the Treaty on the Functioning of the European Union must be followed. The main challenges also address the Communication from the Commission: Community guidelines on State aid for railway undertakings (2008/C 184/07) and its evaluation issued by the EC on 30th October 2020 (as part of the evaluation of State aid rules adopted as part of the State Aid Modernisation package, incl. the guidelines from 2008).

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The main challenges:

- **When notifying and providing state aid**, EU Member States should **introduce KPIs to monitor** whether the structural changes take effect and produce results. Member States have to provide transparent and controllable data and introduce a transparent mechanism for evaluation.

- **Access to both new and second-hand rolling stock** must be the same for all operators: publicly funded rolling stock must be available on equal terms. State guarantees to purchase or renew rolling stock must be granted to all operators, regardless of their ownership structure.

- **Debt cancellation policy and capital increase** have a negative effect on the competitiveness of the rail market. In cases of such aid, cross-subsidization must be avoided, especially in cases of having vertically-integrated structures with dominant operator & infrastructure manager, but also with in-house ticket vendors and other commercially-orientated subsidiaries. If state aid is received, then profit transfer and control agreements within the holding group must be terminated. The evaluation of the impact of such State Aid on the passenger rail sector has to be one of the conditions: state aid provided to an incumbent cannot lead to undermining competition policy and by doing so long-term environmental objectives.

- Several criteria have to be met **specifically avoiding cross-financing,** including access to the ticket sales platforms of those operators receiving state aid on fair, reasonable and non-discriminatory commercial terms: Ticket vendors must be able to cover their costs and be able to make a reasonable margin, with access to all 'customer relevant' datasets (e.g. real-time occupancy data). The control and access to such data such cannot be allowed

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to become competitive advantage for the in-house ticket vendor of an operator that receives state aid.

- In **state aid programs that finance safety, interoperability or R&D** the criteria used by the Member States urgently needs to be adapted: ALLRAIL suggests launching a "minimal viable approach", so that all operators can participate in such programs. Otherwise these financial programs do not benefit the entire sector, but instead strengthen the gap between legacy operators and newcomers. The financial burden for companies in implementing these systems and schemes must be proportional to that company's size.

Transparent criteria & evaluation

In passenger rail, there is an often an absence of well-defined objective of common interest for the entire sector. Supposedly sectoral solutions are in reality only available to the state-owned incumbents and the help provided to them only increases the gap between state-owned and independent companies. In the enclosed notes to the Railway Guidelines, we presented such an example in the case of rolling stock. A more recent and striking example of preferential treatment within the rail sector is the financial help provided to incumbents during the pandemic.

EU Member States should provide an analysis of the market and transparent data about taxpayer investment in rail, especially regarding public service contracts (PSC). **In the case of PSCs, the Altmark criteria have to be followed and enforced:** (1). PSO must be clearly defined & specified;(2). parameters for calculating the compensation must be objective, transparent and established in advance;(3). compensation cannot exceed what is necessary to cover all or

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part of the costs incurred in the discharge; (4). If there is a direct award, then compensation must be determined on the basis of an analysis of the costs of a typical well-run company.

Alas, in many European countries, the national set-up of transportation plans and public service contracts is not being efficiently controlled.
Ex-ante financial parameters and control of overcompensation is currently not possible due to lack of transparent data, or even tools. Unfortunately, we think that that these tools have not been established on purpose.

The renaissance of the international passenger rail services & night trains

With the European Green Deal, there are discussions about **the renaissance of international passenger rail services (TEE 2.0) & night trains** Regrettably, the way that these services are being devised copies the unsuccessful history of European passenger rail In the 20th Century. Instead of a sectoral approach that focuses on limiting barriers to entry (i.e. fair access to infrastructure, incl. capacity or service facilities, lowering charges and access to rolling stock), the Member States are heavily promoting their national incumbents both politically and financially. **PSO has to be based on sound financial analysis, not a one-sided bid for unilateral subsidy by an incumbent.**

Such an approach is alas a short-term action promoted as being the solution rather than a transition with a long-term effect and modal shift. Instead, the European Green Deal should incentivize private investments and facilitate the transition to a greener economy. **If support for new international passenger services and night trains is not based on fair competition and if it means reducing the likelihood of private investment, then it clearly cannot meet the objectives of the Green Deal.**

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The real role model are new night services of privately owned operators that do not need subsidy (such as Snalltaget since 2007 or RegioJet since 2014, most recently launching the 5-country night service between the Czech Republic and Croatia in summer 2020).

Questions:

1. **What are main changes you would like to see in the current State aid rules book to make sure if fully supports the Green deal?**

- **Full financial transparency and sufficient tools in order to achieve this have to be implemented**
- **It has to be described, monitored and evaluated how public investments and state aid incentivise private investment.**

2. **If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?**

Our main approach is **granting the possibility and an equal access to use the current infrastructure** (both in terms of hard as well as the soft "data" infrastructure) **in non-discriminatory manner by all participants on the market.** Such an approach represents a minimal impact on the environment – on the contrary, it enables to use the current infrastructure more efficiently and sustainably.

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3. **If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?**

- The Green bonuses can be financial and non-financial. We support the incentives such as reducing the track access charges, also to address the fair contribution by each transport mode of the cost of environmental externalities that it causes.

4. **How should we define positive environmental benefits?**

- Positive environmental benefits can be defined, and even **measured**, especially by the increase in passenger numbers.

2. ANTITRUST RULES:

The antitrust rules and their enforcement are influenced by the above-mentioned role of the state and its shareholder position. Therefore, the fair competition is in many cases difficult to enforce on the national level.

To solve the problem, oversight or even enforcing competition rules by the European Commission is essential. The examples of passenger rail market opening so far in Europe has shown not just the benefits– for passengers and the environment - but also how difficult it is to achieve for non- discriminatory conditions on the national level. These examples clearly manifest the need of enforcing competition rules – for instance in the case of second-hand rolling stock and an alleged cartel agreement between OEBB and ČD that sought to "eliminate" a new entrant competitor's access to 2nd hand rolling stock or the most recently, the statement of objections sent to ČD on 30th October 2020 in

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which the EC expressed the preliminary view that ČD had breached EU antitrust rules by charging prices below costs.

1. **Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes):**

   -> Cooperation vs closed clubs (and cartels)

Opening-up the rail market means fostering innovation and bringing other modes of transport together. Recently, especially in the discussion on the international services the need for cooperation is often mentioned by state rail incumbent advocates.

However, in the case of new international connections and night services, such cooperation is often **a closed club only among state-owned companies.** Such "*cooperation*" undermines any attempts to allow competition to grow the total rail market. It cannot be the case that a pan-EU night train cartel is being built up paid for by the taxpayer - by means of direct awards. Private companies also cooperate (e.g. WESTbahn and RegioJet), but such co-operation is not by market dominant entities that effectively prevent others from operating.

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The scope and scale of both historical as well as new cross-border collaborations between state-owned national rail incumbents is worrying and constitutes a major obstacle for competition. With few if any exceptions, incumbents invariably work with each other across borders, arguing that only each other can offer mutual networks and ticketing and maintenance infrastructure in order to offer comprehensive rail coverage across borders. Small operators only have a limited number of routes and trains (seeing as they did not inherit national networks and rolling stock fleets from their previous role as the state operator) and are, according to incumbents, not attractive partners. More specifically, incumbents work together in the area of operations – cross-border long distance trains – then also through tickets, ticket sales and marketing/brand awareness Here are some examples:

- All across Europe, incumbents collaborate on the level of exchange of the volumes based on a UIC agreement. In case of cross-border services at least one part may be under PSO and subject to exchange of volumes. It is very difficult to control transparency of such a system that moreover prevents other competitors from being part of such revenue sharing.
- **The collaboration has to be possible on the open rail market, but no collaboration should threaten and eliminate competition. Any new subsidy to bolster the incumbents' market dominance (e.g. direct award to ÖBB Nightjet for night train to Amsterdam) will make the market even more lop-sided than it already is, making the likelihood of any competition even more unrealistic.**

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Cooperation: Ticketing and distribution:

Current ticketing condition and distribution represents a barrier that, if removed, bring immediately more passengers on board and helps modal shift greener transition.

The well-known market dominant sales channels of state-owned incumbent are crucial infrastructure access points: therefore the non-discriminatory transparent retail of all tickets have to be ensured through them. Incumbent branded sales channels that have been inherited from historic state funding are effectively part of the national rail infrastructure and should display and sell all rail options to customers. Lack of transparent, impartial ticket distribution is the silent killer for modal shift to passenger rail and prevents achieving the transition to greener economy.

EU citizens should be able to:

1. search and book ALL rail options at ALL rail ticket sales channels, including optimal one-way connections that combine different operators with different transport contracts and

2. have the confidence that - whatever kind of one-way rail booking they make - they will reach their destination at no extra cost even if there is a missed connection during the journey. As long as minimum connection times are independently approved & feature in a journey planner then a one-way journey that combines different operators should be a through ticket with passenger rights coverage from beginning until end of the entire journey

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The current situation allows market dominant incumbents to deny new entrants fair participation in the market dominant ticket sales platforms that they inherited from taxpayer & also denies them exposure.

Competition between different rail tickets sales channels (otherwise known as 'ticket vendors') should not be in terms of which ones have better access to data. Instead:

- all licensed ticket vendors – regardless whether they belong to a rail operator or are independent – should receive access to all the same rail data (timetables, real-time information and all fares) from state-owned incumbents and be obliged to show, combine and sell all rail tickets, for example if changing trains provides cheapest and/or fastest connections between any two railways stations in Europe.
- Competition between ticket vendors should instead take place in terms of which ones refine rail data in the most optimal manner, in order to make passenger rail more accessible and usable for passengers.
- Door-to-door multi-modal journeys should be put together with passenger rail as the backbone. These would rival the convenience of using the private individual motor car – achieving real modal shift(!)

Let us not forget: EU taxpayers spend many billions of euros each year on subsidising EU rail system. Therefore, it is only reasonable they should be able to search and book all available rail options and book them in an easy & convenient manner, regardless which ticket vendor they go to. If the available rail options (and connections across different rail operators) are easier to book, then this will achieve modal shift.

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2. **Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?**

We believe that the legal basis of Treaty on the Functioning of the European Union with the EU antitrust law in the Articles 101 and 102 and the EU case law represents a solid regulatory framework in general.

In particular, there is a need for clarification of the sectoral Regulation (EU) 2016/2338, especially in terms of EU cross-border services and hybrid PSO-Open Access services. With regard to PSO and Open access, the current legislation of the Economic Equilibrium Test (in Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018) laying down the procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU and its implementation by the Member States also hinders competition as it is often used by the current PSO operators, in all cases state-owned companies, to prevent competition from entering the market. As the responsible DG for the transportation legislation is DG MOVE, the competition perspective on these issues would be invaluable.

3. **MERGER CONTROL**

From the perspective of passenger rail, the biggest threat for the Green Deal where competition policy is in the lead is the State Aid control and Antitrust rules, rather than mergers. The merger transaction in the passenger rail that

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can result in lasting damage to competition in the internal market is mostly connected to manufactures and suppliers. There has been pressure on protecting the EU market and EU standards.

Such an approach has to be balanced with the impact on the consumers – in this case the railway operators and passengers as secondary affected. The current European rail manufacture and supply market is still very closed market resulting in long delivery times and high costs. Therefore, any merger between competitors in the EU rail market might lead to even more closed market and as a result, reduction of competition in the supply of rolling stock, components or other services.

Market definition: Evaluation and clarification of the market definition would help legal certainty, especially in the case of defining the product-relevant market and setting of criteria for market dominance.

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Overview of the measures to be taken for the successful Green Deal – also submitted to Executive Vice-President Timmermans

1. Temporary legislative measures

URGENT help is needed	➢ For passenger operators - Temporary PSO or a special for commercially-driven open-access services – like the current model in Austria & Italy respectively ➢ For rail ticket vendors – Preferably a grant or credit line to ensure they survive the crisis ➢ Prioritisation of applications should be based on their contribution to the EU's climate objectives!
Expenses must be cut	➢ The track Access Fees (TACs) at infrastructure managers are too expensive: at the very most they should reflect direct costs – while the target should be well below. In any case: NO mark ups. TAC relief should stay until 2023. Sadly, the Regulation (EU) 2020/1429 of the European Parliament and of the Council of 7 October 2020 establishing measures for a sustainable rail market in view of the COVID-19 outbreak is currently <u>not</u> implemented for passenger rail in any single Member States ➢ Need exemption from TACs for all services not offered because of the corona crisis ➢ Member States must ensure fee reduction does not lead to financing bottlenecks for infrastructure managers. Also: we need the progressive elimination of costly energy fees (e.g. EUR 15 per MWh in Austria). The long term goal must be elimination of such fees for passenger rail until end of 2023
Sanitary measures	➢ Sanitary measures must be gotten right in rail, to avoid people using their private cars ➢ Suggest duty to wear masks (& related measures) instead, in order to flatten the peaks

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	➢ After all, social distancing on trains would reduce capacity by up to 80 %, this would disastrous for commercially-driven passenger rail operators (and, indirectly, the ticket vendors) ➢ Must be exactly <u>the same</u> sanitary measures across other transport modes as well, such as airlines

2. Specific rail investment projects over next 6-12 months

Rolling stock (train coaches)	➢ Rolling stock financing is a major problem for newcomers – even though open access operators are the ones that are able to purchase faster (no endless procurement regime) ➢ Make funds available to invest in new interoperable long distance train coaches, **including night trains**. ➢ Financing tools need to be prepared fast (example: no more limit at EUROFIMA to only finance PSO rolling stock; no need for newcomers to become EUROFIMA shareholders; shares taken on by Member States instead)
Ticketing & Sales	➢ EU citizens/taxpayers pay billions of euros each year for the EU rail system & thus deserve to be able to search and book all available rail options at all ticket vendors ➢ After years of expensive projects run by incumbents, passenger rail is still lacking an integrated ticketing solution ➢ We call for Open Data – both via 3rd party ticket vendors & incumbent retail channels ➢ Model: in April 2020 a Swedish government investigation recommended that there must be impartial ticket retail **to make the passenger rail system more accessible**
Infrastructure	➢ We need a "Special Infrastructure Fund", that means: accelerated, quick fix infra improvements to maximise

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	efficiency, with ALL operators receiving equal access to stations as well as relief measures for bottlenecks & the re-activation of sidings ➢ Priorisation: bottlenecks should be eliminated fast –need a legal basis for a special procedure that cuts down the timeline for necessary permits – the target should be 2 months after an application. New projects would also help employment

3. <u>Usefulness of the funding instruments</u>

Need improved, targeted Temporary Framework	➢ Existing Temporary Framework has delivered €1.9 trillion, but how much has been used on passenger rail (incumbent & new entrant) so far? – a tiny percentage (approx. €1.3 billion in Austria & Italy) ➢ Unfortunately, the framework has disproportionately helped other transport modes that compete with passenger rail, such as car manufacturers and airlines ➢ Consequently, we need <u>Special Rail Programmes</u> in EU Member States (that do not just bail out state incumbents) – currently there is a bad precedent with DB in Germany
New Recovery Fund	➢ There must be clear tools in the Recover Fund that new entrants can access equally ➢ Prefer grants (vis-à-vis loans) - because rail has problems to attract private money. New investors would otherwise put off due to long term financial payback obligations
CEF, MFF, Structural Funds & Shift2Rail	➢ Big problem with these programmes is that the minimum viable participation threshold for independent passenger rail companies is much too high. ➢ In reality, only state incumbents can afford to participate. E.g. ERTMS while only paying 25% still very expensive; and 100% has to be funded upfront

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	➢ Programmes should be designed to actively include private rail companies
European Invest-ment Bank	➢ We need new Green Bonds – for digital technology – Ticketing & long distance train coaches and state guarantees for new interoperable rolling stock built after 2020 ➢ BUT minimal costs for new entrants are still too high; only incumbents can afford them. This still needs to be rectified

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About ALLRAIL

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