

# Financial Markets Newsletter

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## Financial Markets Newsletter

November 2009

### The Netherlands – Law and regulations

- Act implementing the Payment Services Directive takes force
- Decree on Conduct of Business Supervision of Financial Undertakings FMSA amended

### The Netherlands – Other

- Consultation on Amendment of the Financial Markets Supervision Act 2011
- Consultation on Regulation amending the Financial Markets Supervision Act 2010
- Policy on international dimension of liability of financial sector supervisors
- Consultation on disclosure obligations for cash settled financial instruments
- AFM publishes interpretation of 'securities' in section 5.1a FMSA
- Consultation on new proposals for mortgages
- Banks adopt banking code as of 1 January 2010

### International - Regulations

- New UCITS Directive published
- Regulation on credit rating agencies published

### International – Other

- Proposed amendment of the Prospectus Directive
- Commission adopts legislative proposals to strengthen financial supervision in Europe
- Commission consultation on crisis management in the European banking sector
- Consultation on amendments to Financial Conglomerates Directive
- CESR publications
- CEBS publications
- CESR, CEBS and CEIOPS publish summary of implementation of Anti-Money Laundering Directive
- IOSCO publications

## The Netherlands | Law and legislation

### Act implementing the Payment Services Directive takes force

The Act implementing the Payment Services Directive (*Wet implementatie Richtlijn betalingsdiensten*)<sup>1</sup> came into force on 1 November 2009. The Act amends the Financial Markets Supervision Act (*Wet financieel toezicht, FMSA*), the Dutch Civil Code (*Burgerlijk Wetboek*) and the Money Transactions Offices Act (*Wet inzake geldtransactiekantoren*). As a result of the new Act, licence and information requirements for payment service providers are now set out in the FMSA. There are also new rules governing the relationship between payment service providers and consumers.

The Decree implementing the Payment Services Directive (*Besluit ter implementatie van de Richtlijn betalingsdiensten*) has also entered force<sup>2</sup>. This amends the following governmental decrees:

- Decree on administrative penalties for financial firms (*Besluit bestuurlijke boetes financiële ondernemingen*);

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<sup>1</sup> Act of 15 October 2009 amending the FMSA, the Dutch Civil Code, the Money Transactions Offices Act and repealing the Cross-border Payments Act (*Wet op het grensoverschrijdend Betalingsverkeer*), in implementation of Directive no. 2007/64/EC of the European Parliament and of the Council regarding payment services in the internal market, and amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (PbEU L 319) (Bulletin of Acts and Decrees 2009, 436).

<sup>2</sup> Decree of 23 October 2009 amending the Decree on the Funding of Financial Markets Supervision (*Besluit bekostiging financieel toezicht*), the Decree on administrative penalties under financial legislation, the Decree on Market Access of Financial Firms FMSA, the Decree on Prudential Rules, the Decree on Prudential Supervision Financial Groups FMSA and the Decree on Conduct of Business Supervision of Financial Undertakings FMSA, in implementation Directive 2007/64/EC of the European Parliament and the Council of the European Union of 13 November 2007 regarding payment services in the internal market and amending Directives 97/7/EC, 2002/65/EC, 2006/48/EC, and withdrawing Directive 97/5/EC (Bulletin of Acts and Decrees 2009, 437).

- Decree on Market Access of Financial Firms FMSA (*Besluit Markttoegang financiële ondernemingen*);
- Decree on Prudential Rules FMSA (*Besluit prudentiële regels Wft*);
- Decree on the Prudential Supervision Financial Groups FMSA (*Besluit prudentieel toezicht financiële groepen Wft*);
- Decree on Conduct of Business Supervision of Financial Undertakings FMSA (*Besluit gedragstoezicht financiële ondernemingen Wft*).

Lastly, the Exemption Regulations pursuant to the FMSA (*Vrijstellingsregeling Wft*) has also been amended<sup>3</sup>. The Directive allows EU Member States to decide whether to provide a full or partial exemption to the licensing requirements. The Netherlands has chosen to allow exemptions but only for some payment services. It is not possible, for example, to receive an exemption from the licensing requirement for executing money transfers and it remains compulsory for payment service providers that are exempt from licensing requirements to register and provide security for the monies they receive, in the same way as payment service providers with a licence.

### Decree on Conduct of Business Supervision of Financial Undertakings FMSA amended

The Decree on Conduct of Business Supervision of Financial Undertakings FMSA has been amended in connection with rules increasing transparency of commissions and remuneration<sup>4</sup>. The most significant amendments are:

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<sup>3</sup> Government Gazette 2009, 16444.

<sup>4</sup> Decree of 16 September 2009, including in the Decree on the Conduct of Business Supervision of Financial Undertakings FMSA (*Besluit Gedragstoezicht financiële ondernemingen Wft*) an obligation for offerors to provide transparency with respect to the costs in connection with complex products and mortgages and a prohibition on bonus provisions for offerors and intermediaries and amending the Decree on Administrative Penalties under financial legislation (Bulletin of Acts and Decrees 2009, 401).

- In addition to complex products and mortgages, protective payment<sup>5</sup> insurance and funeral insurance are now included in the transparency rules for commission payments and remuneration.
- The inclusion of a prohibition on paying and receiving bonus commissions. An exception applies for certain non-monetary provisions.
- Rules regarding cost transparency for complex products and mortgages have been included.

The Decree on administrative penalties for financial firms has also been amended. These amendments will come into effect on 1 January 2010<sup>6</sup>.

### Netherlands | Other

#### Consultation on Amendment of the Financial Markets Supervision Act 2011

The Ministry of Finance has commenced a [consultation](#) (in Dutch) on the Amendment of the Financial Markets Supervision Act 2011 (*Wijzigingswet financiële markten 2011*). The draft Amendment contains both substantive and technical non-substantive amendments to the FMSA. Various substantive amendments are:

- Investment firms will no longer have market access under a collective licence and affiliated firms will now be assessed on all licensing requirements. Investment firms entering the market, or currently operating in the market, with a licence from the Dutch Central Bank (*De Nederlandsche Bank, DNB*) will be able to be treated as if they have a collective licence, by way of designation to that effect;
- The supervisory body that grants the licence will now also assess the expertise of the members of the supervisory board. The expertise of current supervisory directors will be assessed on reappointment, but supervisory bodies can investigate these supervisory directors if relevant facts or circumstances arise.

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<sup>5</sup> Insurances that cover the risk that the policyholder is unable to meet his/her payment obligations pursuant to a credit agreement.

<sup>6</sup> Bulletin of Acts and Decrees 2009, 458.

- The Pension Act (*Pensioenwet*), the Compulsory Professional Pension Scheme Act (*Wet verplichte beroepspensioenregeling*), the FMSA and the Trust Offices Supervision Act (*Wet toezicht trustkantoren*) will provide that for the purposes of the Act the reliability of a policymaker, co-policymaker or prospective policymaker will not be questioned if DNB or the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten, AFM*) has determined the reliability of such policymaker in connection with any other law.
- Clarification is given on whether a licensed credit institution with its registered office in non-Member State will fall under the prohibition on the use of the word 'bank'. Such credit institution does not have an automatic right to use the word 'bank' in the Netherlands.
- Article 4:45 FMSA currently provides for a ranking of debts to the effect that the assets of an investment firm should solely serve to settle claims arising from debts in connection with the management and safekeeping of the investment fund and claims arising from the participation rights in the investment fund. This ranking of debts will now also apply to sub-funds.
- The Money Transactions Offices Act will be repealed.

Further, the proposed Amendment will amend a number of other acts:

- The Pension Act;
- Compulsory Professional Pension Scheme;
- Trust Offices Supervision Act;
- Sanctions Act 1977 (*Sanctiewet 1977*);
- Consumer Protections Enforcement Act (*Wet handhaving consumentenbescherming*);
- Audit Firms Supervision Act (*Wet toezicht accountantsorganisaties*);
- Prevention of Money Laundering and Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*);
- Economic Offences Act (*Wet op de economische delicten*).

The consultation is open until 4 January 2010, with the Amendment intended to take force on 1 July 2011.

### **Consultation on Regulation amending the Financial Markets Supervision Act 2010**

The Ministry of Finance has commenced a [consultation](#) (in Dutch) on the Regulation amending the FMSA 2010 (*Wijzigingsregeling financiële markten 2010*). The Regulation amends the Exemption Regulation pursuant to the FMSA and the Implementation Regulation for the Prevention of Money Laundering and Terrorist Financing Act. The amendments are primarily of a technical nature.

#### *Amendment of the exemption for offers with a total equivalent value of less than EUR 2.5 million*

Article 53.2 of the Exemption Regulation pursuant to the FMSA provides for an exemption from the provisions of chapter 5.1 FMSA for securities that are part of an offer where the total equivalent value of the offer calculated over a 12-month period is less than EUR 2.5 million.

This article is amended as follows:

- Clarification is given that the calculation of the total equivalent value of the offer refers to the total equivalent value within the European Economic Area and not merely the total equivalent value in the Netherlands;
- In addition, the scope of the exemption in chapter 5.1 FMSA has been restricted to the category of securities and not to the category and class of securities. The Ministry of Finance intends this amendment to tie in with the interpretation of the Prospectus Directive in other Member States.
- A new third paragraph has been added to the exemption referred to in the second paragraph where group company offers will be calculated together.
- The fourth paragraph (new) has been amended in accordance with the Amendment of the Financial Markets Supervision Act 2010. In advertising and documents in which an offer or admission are announced, offerors must mention that no obligation exists to make a prospectus that has been approved by the AFM in the context of the offer or admission generally available pursuant to the law and that no supervision is exercised by the AFM.

As with the Amendment of the Financial Markets Supervision Act 2011<sup>7</sup>, the amending Regulation is intended to come into effect on 1 January 2010.

### **Policy on international dimension of liability of financial sector supervisors**

In July, the Molengraaff Institute for Private Law published a report on whether the difference in national regimes governing liability could pose an additional risk for the AFM and DNB and have a negative effect on the financial sector in the Netherlands. The conclusion of the researchers was that while the Netherlands was the only country included in the research that did not have a statutory limitation on the liability of financial supervisors, the likelihood of the risk of further international liability is limited as, in practice, Dutch Courts are very reticent in assuming liability of financial supervisors. Earlier in 2006, the Van Dam Committee concluded that a supervisor acting reasonably does not run any real liability risk under Dutch law.

The Minister of Finance informed the Second Chamber that he endorsed these conclusions. He noted that issues considered by the Committee regarding the Investment Premium Scheme could result in foreign law being applicable to legal proceedings that have an international dimension in respect of the issue of the liability of Dutch financial supervisor's vis-à-vis any foreign aggrieved party. In the opinion of the Minister, the supervision exercised by financial supervisors must be considered as the exercise of governmental authority, which is a field pre-eminently left to the sovereignty of the state. He considers it unfortunate that foreign law could be applicable to the liability of financial supervisors and will request the government committee on the Investment Premium Scheme to give its advice to ensure that Dutch law will continue to apply to cases such as these.

### **Consultation on disclosure obligations cash settled financial instruments**

The Ministry of Finance has conducted a [consultation](#) (in Dutch) on proposals to extend the disclosure obligations for controlling and capital

<sup>7</sup> Parliamentary Papers 2009/2010, 32 036.

interests in the FMSA to include economic long positions. This relates to financial instruments that provide the holder with an economic value that is dependant on the increase in value of shares in a listed company (long positions), without the holder having any legal right to the underlying shares. Examples are contracts for differences and total return equity swaps. There is currently no specific disclosure obligation for these financial instruments.

As the contract parties currently have the option of settling in shares, a shareholder can build up an interest in an issuing institution without the company, other shareholders and the market receiving notification of this in accordance with transparency obligations. There are examples of this happening in other European countries. One result of this is that British and French supervisory bodies have taken measures to include these instruments in the reporting thresholds.

The Ministry of Finance has published the draft Bill and draft explanatory memorandum on its website.

### **AFM publishes interpretation of 'securities' in section 5.1a FMSA**

The AFM has published an [interpretation](#) (in Dutch) of the concept 'securities' in section 5.1a of the FMSA:

"The implementation of the Transparency Directive has caused some lack of clarity on the definition of 'securities' in section 5.1a of the FMSA. This definition is important in order to answer the following questions, particularly from and about issuing institutions:

- Which Member State is the home Member State for the purposes of the Transparency Directive;
- Whether a home Member State may be elected;
- Whether an interim statement as referred to in section 5:25e FMSA should be made generally available.

'Securities' in section 5.1a FMSA should be understood to mean not only ordinary shares and preference shares, but also 'equity securities' as defined in section 5:1d FMSA and

as applied in section 5.1 FMSA and following from the Prospectus Directive.

In addition to ordinary shares and preference shares, the definition of securities in section 5.1a FMSA therefore also includes:

- depositary receipts for shares;
- transferable participation rights in closed-end investment institutions;
- depositary interests;
- other securities (such as convertibles, warrants and depositary receipts) through which shares or equivalent securities can be acquired, by exercising the rights attached thereto or by conversion or exchange. One condition thereby is that they must have been issued by the institution or group company that also issued the underlying securities.

The context of this is the importance of maintaining the connection between the Transparency Directive and the Prospectus Directive, as stated in Recital 6 of the Transparency Directive.

### **The Netherlands as home Member State**

Institutions that have issued equity securities admitted to trading on a regulated market will have the Netherlands as home Member State if the issuing institution:

- has its registered office in the Netherlands; or
- has its registered office in a country that is not a Member State and is required to submit an annual information update to the AFM pursuant to article 10 of the Prospectus Directive.

This issuing institution must comply with the transparency requirements in Section 5.1a FMSA. One of those requirements means publishing an interim statement as referred to in section 5:25e FMSA, which should be sent to the AFM."

### **Consultation on new proposals for mortgages**

The AFM has developed new [proposals](#) for the provision of mortgage credit. These proposals are

necessary to protect consumers against excessive payment risks when financing their homes. The AFM therefore suggests amending parts of the current income norm. These proposals also include a new debt guideline, where mortgage advice will also take into account the maximum desirable ratio between the debt and the value of the property concerned.

### **Banks adopt banking code as of 1 January 2010**

The board of the Netherlands Bankers' Association (*Nederlandse Vereniging van Banken*) has adopted the [Banking Code](#). The code is a form of self-regulation, which was drawn up on the basis of the report of the Advisory Committee on the Future of Banks (*Adviescommissie Toekomst Banken, Commissie Maas*). Several elements of the code are:

- Variable remuneration for bank executives will be limited to 100% of fixed income.
- The introduction of a moral-ethical statement (an oath) for bankers;
- More attention on expertise and permanent education (a banker's exam).

The code will apply to all banks in the Netherlands and will have a statutory basis.

## **International | Regulations**

### **New UCITS Directive published**

The new UCITS Directive published in the Official Journal<sup>8</sup> takes effect on 7 December 2009. The Directive introduces a passport for management companies and a key information document that replaces the simplified prospectuses of UCITS. The notification procedure has also been simplified. The notification procedure will be harmonized, the host Member State has no authority to request additional documents or amendments, the waiting times will be shorter,

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<sup>8</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (Official Journal 2009, L 302/82).

simpler requirements will apply for translations and data may be sent electronically.

The existing UCITS Directive<sup>9</sup> will be repealed on 1 July 2011. Member States must have implemented the Directive by 30 June 2011 at the latest.

### **Regulation on credit rating agencies published**

The Regulation on credit rating agencies will also take effect on 7 December 2009<sup>10</sup>.

The new rules are designed to prevent conflicts of interest regarding ratings, to improve the quality of ratings and to increase transparency. Credit rating agencies will be required to appoint independent specialists to their advisory council and a registration system for credit rating agencies will be introduced. Credit ratings from third countries may be used under strict conditions.

## **International | Other**

### **Proposed amendment Prospectus Directive**

The European Commission has published [proposals](#) to amend the Prospectus Directive and the Transparency Directive.

The most important elements of the proposed amendments are:

- Obligations to provide information that currently overlap with the transparency provisions for issuing institutions will be withdrawn. The annual information document will be abolished.
- The definition of 'qualified investors' in the EU Prospectus Directive will be aligned with the definition of 'professional clients' in the Directive on markets in financial instruments (MiFID). This will allow investment firms and credit institutions to treat natural or legal persons that they consider to be professional

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<sup>9</sup> Council Directive 85/611/EC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>10</sup> Regulation (EC) no 1060/2009 of the European Parliament and of the Council of 16 September on credit rating agencies (OJ 2009, L 302/1).

clients or eligible counterparties<sup>11</sup>, as qualified investors in the context of private placements of securities;

- There will be clearer exemptions from the obligation to publish a prospectus if companies sell through intermediaries (retail cascades) and for share schemes for employees;
- The validity of a prospectus, base prospectus and registration document will be extended to 24 months provided they are properly supplemented.
- Further clarity on when the requirement to publish a prospectus ends and the time frame within which investors can withdraw their previous acceptance when a prospectus is supplemented during a bid;
- The competent authority of the home Member State will now notify the issuing institution that it has provided a certificate of approval - attesting that the prospectus has been drawn up - to the competent authority of the host Member State.
- No restriction in the choice of home Member State for the issuers of non-equity securities;
- The information requirements for certain types of securities will be reduced. The Commission thereby refers to small companies, small credit institutions, claims issues and government guarantee schemes. The Commission will amend the Prospectus Regulation on this point.

The Commission aims to adopt the amendments in 2010 after the approval of the European Parliament and the Council of the European Union.

### **The Commission adopts legislative proposals to strengthen financial supervision in Europe**

The European Commission has adopted an important [legislative package](#) intended to strengthen financial supervision in Europe. This improved supervision package is intended to provide a durable boost to the financial stability of the entire European Union, to guarantee the application and enforcement of harmonised technical rules, and to identify systemic risk at an early stage. The new rules will also ensure more efficient cooperation in emergency situations and

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<sup>11</sup> According to part II of exhibit II MiFID.

when resolving differences between national supervisors.

The legislative proposals include the creation of a new European System Risk Board (*Europees Comité voor systeemrisico's, ECSR*), which will have a critical role in highlighting the risks to the financial system as a whole and ensuring early warnings of risks that require an immediate response. Further, the proposals envisage the creation of a European System of Financial Supervisors (*Europees Systeem van Financiële Toezichthouders, ESFT*) comprised of national supervisors and three new European supervisory authorities for banking, securities, and insurance and company pensions, respectively<sup>12</sup>.

### **Consultation by European Commission on crisis management in the European banking sector**

The European Commission has commenced [consultation](#) on European rules for managing a crisis in the banking sector. The Commission has asked market parties a number of questions, including (i) whether such a scheme should only apply to deposit-taking banks, or (ii) whether it should only apply to banks of systemic importance.

### **Consultation on amendment of Financial Conglomerates Directive**

The European Commission will open a consultation on an amendment to the Financial Conglomerates Directive<sup>13</sup>. This amendment relates to the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate. The proposed amendments include the scope of the supplementary supervision and the calculation methods used to identify a financial conglomerate.

### **CESR publications**

#### *New version FAQs Prospectus Directive*

CESR has published a new version of the [Frequently asked questions regarding](#)

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<sup>12</sup> European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and European Insurance and Occupational Pensions Authority (EIOPA).

<sup>13</sup> Directive 2002/87/EC.

prospectuses. These questions relate to (i) the right of investors to withdraw their acceptance of the offer if they have purchased securities or registered for securities before the document supplementing the prospectus is published, and (ii) the statement required when an issuing institution intends to include a profit prognosis or forecast in the registration document.

*New version FAQs on Transparency Directive*  
CESR has published a new version of Frequently asked questions regarding the Transparency Directive. The new questions relate to notification and publication of major participations.

### *CESR consultation on definition of 'investment advice' in MiFID*

CESR has commenced a consultation to further clarify what falls under the definition of "investment advice" in MiFID. The definition reads:

"Investment advice means the provision of personal recommendations to a client, either upon its request or at the initiative of an investment firm, in respect of one or more transactions relating to financial instruments."<sup>14</sup>

When providing investment advice an investment firm must comply with a number of specific obligations. It is required, among others things, to obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him."<sup>15</sup> Because it is not always clear whether a "personal recommendation" is being made, CESR has designed a five-step test to clarify when investment advice is being given. The consultation ends on 14 December 2009.

*Publications on implementation measures UCITS*  
CESR has advised the European Commission on the format and content of key information document (KID) disclosures that will replace the simplified prospectus for Undertakings for Collective Investment in Transferable Securities (UCITS). The KID will not exceed two pages and will give a clear summary of the costs, risks and expected returns.

In addition, CESR has published advice on implementation measures for the UCITS management company passport. This passport will make it possible for investment funds with a licence in one Member State to be managed at a distance by a management company located in another Member State.

Finally, CESR is holding a consultation on implementation measures of the new UCITS Directive<sup>16</sup>: measures relating to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS (consultation)

### *Other publications*

- *Inducements: Good and poor practices* (consultation).
- *Trade Repositories in the European Union* (consultation document).
- *Measures adopted by CESR Members on short selling* (update).
- *A common definition of European money market funds*. CESR is considering introducing a uniform definition of money market funds, which is based on the definition used in the MiFID implementing guideline<sup>17</sup> (consultation).
- *The Use of a Standard Reporting Format for Financial Reporting of Issuers Having Securities Admitted to Trading on Regulated Markets* (call for evidence).
- *Consultation on registration, mediation and other related issues regarding the certification and assessment of CRA's systemic importance* (consultation).

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<sup>14</sup> Article 4.1 MiFID.

<sup>15</sup> Article 19.4 MiFID.

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<sup>16</sup> Directive 2009/65/EC.

<sup>17</sup> Directive 2006/73/EC.

- CESR data on prospectuses approved and passported (January 2009 to June 2009)

### **CEBS publications**

- *Advice to the European Commission on the review of the Financial Conglomerates Directive* ([advice](#)).
- *Disclosure guidelines: lessons learnt from the financial crisis* ([consultation](#)).
- *Advice on the effectiveness of a minimum retention requirement for securitisations* ([advice](#)).
- [Work programme](#) for 2010. See also the joint [work programme](#) of CESR, CEBS and CEIOPS.

### **CESR, CEBS and CEIOPS publish summary of implementation of Money Laundering Directive**

The [Compendium paper](#) on the supervisory implementation practices across EU Member States of the Third Money Laundering Directive [2005/60/EC] summarises the manner in which the Money Laundering Directive has been implemented in the various Member States. This concerns in particular the provision regarding customer due diligence and client identification. In addition, it identifies the differences in approach of the various national supervisory bodies.

### **IOSCO publications**

- [Report](#) on Special Purpose Entities.
- Transparency of structured finance products ([consultation](#)).
- Regulatory [standards](#) for funds of hedge funds
- Transparency of Firms that Audit Public Companies ([consultation](#)).
- Unregulated Financial Markets and Products ([report](#)).
- Auditor Communications ([consultation](#)).
- Exploration of Non-Professional Ownership Structures for Audit Firms ([consultation](#)).

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