Coimisiún na Meán

Draft European Works Rules for On-Demand Audiovisual Media Services



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1. Introduction

1.1 These Rules are made by Coimisiún na Meán ("the **Commission**") in exercise of its functions and powers under Part 10A of the Broadcasting Act 2009 as amended ("the **Act**") and, more specifically develop the position set out in sections 159A, 159B(3), 159B(6), 159C(3), 159C(6) and 159I(1).

1.2 These Rules give effect, within the scope of the Act, to the State's obligations regarding the promotion of European works in on-demand audiovisual media services pursuant to Article 13(1) of the Directive 2010/13/EU, as amended by Directive(EU) 2018/1808 the Audiovisual Media Services Directive (AVMSD), as transposed into Irish law by Part 10A of the Act.

1.3 Under the Act providers of on-demand audiovisual media services (hereinafter referred to as "**VOD providers**") under the jurisdiction of the State, must:

a) Ensure that the share of European works in each catalogue of an audiovisual media service is not less than 30% as set out in section 159B(1)**;** and

b) Take the steps specified in these Rules set out by the Commission, as directed under section 159C(3) to ensure the prominence of European works in each such catalogue (section 159C(1)).

1.4 These Rules set out:

a) The method for determining whether a VOD provider has complied with the 30% of European works obligations in section 159B(1);

b) The steps that VOD providers must take to ensure the prominence of European works in their catalogues, for the purposes of section 159C(1);

c) The criteria and thresholds under which VOD providers may be treated as having low turnover, low audience, for the purposes of section 159B(2)(a);

d) The circumstances in which the Commission may, under section 159I(1) exempt a service from the obligations in section 159B(1) and/or 159C(1) by reason of the nature or general theme of the service; and

e) The records, information and compliance activities required for monitoring and supervision under section 159B(6) and 159C(6).

1.5 These Rules do not make provision for exemptions from any levy imposed under section 159E of the Act. Any such exemptions may be addressed in separate rules under section 159I(1).

2. Scope and Jurisdiction

2.1 These Rules apply to all on-demand audiovisual media service providers under the jurisdiction of the State within the meaning of section 2A of the Act and the country-of-origin principle in the AVMSD.

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2.2 For the purposes of these Rules, the obligations set out under section 159B(1) and 159C(1) apply to each catalogue, for each separate VOD service that is made available by the media service provider, to users in any Member State of the European Union or in another European State to which the AVMSD applies in accordance with the country-of-origin principle in the AVMSD.

2.3 Where there is a conflict between these Rules and the provisions of the Broadcasting Act 2009, the provisions of the Broadcasting Act 2009 shall take precedence.

2.4 The scope of these Rules extends to any service a media service provider operates that falls within the Irish jurisdiction including:

2.4.1 A service entered on the register of media service providers who are under the jurisdiction of the State and provide audiovisual on-demand media services maintained by the Commission under Part 10A of the Act;

2.4.2 and also any other service that is subject to registration as an audiovisual on-demand media service under section 46 of the Act where a notification has been received under section 46D of the Act, or alternatively, where no notification has been received under section 46F of the Act by the Commission but the Commission deems a provider to be an audiovisual on-demand media service provider under 46F of the Act.

3. Purpose and Preparation of the Rules

3.1 The purpose of these Rules is to:

a) Give effect to the obligations arising under section 159B(1) and 159C(1) of the Act;

b) Establish a title-based methodology for calculating the 30% share of European works in each catalogue;

c) Specify a measurable framework for ensuring the prominence of European works;

d) Set out clear criteria for exemptions on the basis of low turnover, low audience, and narrow subject matter, in accordance with section 159B(2), 159C(2) and 159I(1); and

e) Provide for reporting, monitoring and verification arrangements that are consistent with the Commission's statutory functions.

3.2 The Rules have been prepared in accordance with section 159A, 159B, and 159C,159D, and 159I of the Act, having regard to:

3.2.1 The objectives and provisions of the AVMSD including Article 13(1) and Recital 35;

3.2.2 The European Commission's guidelines issued pursuant to Article 13(7) of the AVMSD;

3.2.3 Specifically in respect of section 159B(1), any relevant reports produced by the European Board for Media Services Established under Article 8 EMFA;

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3.2.4 An assessment of the relevant characteristics of the market in which the media service provider operates including the turnover of the provider from the service in the market and the number of audience members of the service in the market (proportionality); and

3.2.5 The need to ensure that regulatory arrangements are fair, consistent, transparent and proportionate, and that unnecessary administrative burdens on regulated entities are minimised.

4. Regulatory Principles Relevant to the Rules

4.1 In its interpretation, application and enforcement of the Rules, the Commission shall act lawfully, rationally and fairly, in accordance with its public law duties and its statutory objectives and functions under section 159A, 159B(3), 159B(6), 159C(3), and 159I(1) of the Act.

4.2 The Commission shall have due regard to:

a) The objective of cultural diversity;

b) The desirability of providing European works to the widest possible audience;

c) technological developments;

d) developments in the audiovisual on-demand media service markets; and

e) any relevant reports produced by the European Board for Media Services.

4.3 In particular the Commission shall act in accordance with:

a) its general statutory objectives and functions under the Act;

b) the specific statutory objectives underpinning the Rules, including the promotion and prominence of European works; and

c) the rights conferred by the Constitution, the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights insofar as applicable under the European Convention on Human Rights Act 2003 and the EU Treaties.

5. Severability

5.1 If any paragraph, or any sub-paragraph of part of a paragraph of the Rules is found to be unlawful, invalid, prohibited, unenforceable or inapplicable (either generally or with respect to a particular media service provider(s)) in any respect, on the basis of any law (including the Constitution and European law), such finding shall not affect the lawfulness, validity, enforceability or applicability of any other provision of the Rules or part thereof, unless the finding is declared to be applicable to such other provision or part thereof, or the same is the subject of the relief granted by a court.

5.2 Without prejudice to Rule 5.1, all of the other paragraphs and/or parts of the Rules shall remain fully effective, applicable and enforceable. To the extent necessary any provision or part of the Rules, found to be unlawful, invalid, prohibited, unenforceable or inapplicable, shall be severed from the Rules.

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6. Waiver

6.1 The fact that the Commission does not respond to or comment upon any submission, assessment, proposal, report, compatibility statement or any analogous document submitted to it by an on-demand audiovisual media service provider,, shall not be deemed to be an acceptance or approval of the contents of any part of the same and shall not imply that the media service provider has complied with its obligations under the Act and/or the Rules.

6.2 Without prejudice to the foregoing, the fact that the Commission does not respond or comment on any such document shall not create an estoppel against, or constitute a waiver by, the Commission of any of its powers or rights pursuant to the Act and/or the Rules.

6.3 The Commission may provide general non-binding guidance regarding the provisions of the Rules on request or as and when it is deemed necessary. The Commission reserves the right to publish and amend guidance from time to time as it sees fit. Requests for guidance must include the relevant material linked to the request for guidance. The request should clearly state the section(s) of the Rule which the requestor believes are relevant and set out the specific questions about which the requestor would like a view. The Commission accepts no liability for any decision (or consequence therefrom) made following receipt of non-binding general guidance from the Commission.

7. Definitions

7.1 In these Rules:

- "Act" means the Broadcasting Act 2009, as amended
- "Audiovisual on-demand media service" (hereinafter referred to as "VOD service") has the meaning given in section 2 of the Act.
- Corporation" means RTÉ or TG4 or both, as the case may be.
- "European works" has the meaning given in section 159A of the Act (see Appendix 1 of these Rules)
- "Media service provider" has the meaning given in section 2 of the Act.
- "Prominence" means the visibility and accessibility of European works within a catalogue including but not limited to their placement, labelling, searchability, recommendation and curation, in a manner that facilitates access to such works, in line with section 159C(4) of the Act.

8. Quota Obligations

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8.1 A VOD provider shall ensure that not less than 30% of the total number of titles in each catalogue of each service it provides are European works as defined in section 159(1).

8.2 The calculation of the share of European works shall be:

a) Conducted by number of titles, and

b) Applied separately to each catalogue maintained by the VOD provider's service.

8.3 Accordingly, a "title" corresponds to:

8.3.1 one feature or TV film; or

8.3.2 one season of a TV series. Where a TV series is not commissioned by season, for example in the case of continuing series (e.g. soap operas or quiz shows), one European works title corresponds to one year of production.

8.4 The Commission recognises that it is increasingly the case for some television programmes to have a duration and production cost similar to those of films. In such cases, it may be appropriate for an individual programme in a TV series to be given higher weighting in calculating the share of European Works. Specific episodes of a TV series may be considered a standalone European works title only where the following apply:

a) The episode roughly corresponds to the typical length of a feature film; and
b) The cost of an episode roughly corresponds to the mean budget of a feature film.

8.5 For the purposes of section 159B(1) of the Act, a VOD provider will be regarded as complying with the share requirement where, throughout the relevant reporting period:

a) The proportion of titles in each catalogue that qualify as European works does not fall below 30%; and

b) The provider has monitored and managed content so as to maintain at least a 30% share of European works on a continuous basis.

8.6 For the purposes of assessing compliance with section 159B(1) of the Act, the Commission may assess whether the share of European works in each catalogue meets the requirement in Rule 8.1 by reference to information submitted by the provider through the annual compliance report, including information relating to the composition of the catalogue at specified reference points or over defined reference periods during the reporting year, as determined by the Commission through the reporting template or accompanying guidance.

8.7 The Commission may issue guidance on the treatment of particular content categories, including short works and collections, to ensure consistent application of the title-based methodology and alignment with European Commission guidelines.

9. Prominence Obligations

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9.1 In accordance with section 159C(1) of the Act, a VOD provider shall take appropriate and proportionate steps to ensure that European works are prominently displayed and easily discoverable within each catalogue of each service.

9.2 For the purposes of section 159C(3) of the Act, a VOD provider shall implement systematic metadata tagging and labelling of European works such that they can be reliably identified for search, filtering recommendation and reporting purposes.

9.3 For the purposes of section 159C(3) of the Act, a VOD provider must implement not less than one of the following prominence measures:

a. a dedicated European works section or collection, clearly identifiable as such and directly accessible from the homepage or equivalent primary entry page;

b. inclusion of European works in featured, curated, promotional or highlighted areas (such as banners, carousels, recommended, trending or similar promotional slots);

c. editorial curations (e.g. themed collections, playlists or recommendations) that ensures a fair and sustained representation of European works relative to non-European works;

d. algorithmic or other recommendation mechanisms designed, configured or calibrated to give European works a level of visibility that is reasonable and proportionate, having regard to the overall share of European works in the catalogue;

e. other measures which demonstrably enhance the visibility and discoverability of European works in line with Recital 35 of the AVMSD.

9.4 Subject to compliance with Rules 9.2 and 9.3, VOD providers are not precluded from implementing other types of prominence measures as they see fit.

9.5 Measures required under this Rule shall be:

a) Applied consistently throughout the year, however this shall not preclude the use of additional or innovative approaches to promote European works, provided that the requirements of this Rule continue to be met;

b) Implemented in a manner that is technologically neutral and respects the diversity of service designs; and

c) Designed so that the prominence of European works is genuine, sustained and verifiable, and not merely formal or nominal.

9.6 The Commission may verify compliance with this Rule by:

a) Reviewing screenshots, interface captures or test accounts;

b) Examining metadata extracts or configuration documentation;

c) Considering analytics or performance indicators; and

d) Carrying out spot checks, inspections or audits on individual services.

9.7 For the purposes of assessing compliance with section 159C(1) of the Act, the Commission may assess whether appropriate and proportionate steps have been taken to ensure the prominence of European works within each catalogue, including compliance with Rule 9.1, by reference to information submitted by the provider through the annual compliance report. This may include information relating to the composition of the catalogue at specified reference points or over defined reference periods during the reporting year, as determined by the Commission through the reporting template or accompanying guidance.

9.8 The Commission may issue guidance on the interpretation and application of the prominence obligations in order to support consistent implementation of these Rules and alignment with European Commission guidance and best regulatory practice.

10. Exemptions

10.1 Exemptions

10.1.1 A VOD provider may, in respect of a particular catalogue, apply for an exemption from:

a) The share obligations in section 159B(1) and Rule 9; and/or

b) The prominence obligations in section 159C(1) and Rule 10.

Where the service meets one or more of the conditions set out in Rules 10.2 – 10.4

10.1.2 The Commission shall assess eligibility for exemption separately for each catalogue falling under its jurisdiction, regardless of the provider's total EU or global turnover or audience.

10.1.3 These Rules concern exemptions from the obligations in sections 159B(1) and 159C(1) only. Any exemptions from a levy under section 159E shall be considered under separate rules and are not determined by these Rules.

10.2 Low Turnover

10.2.1 A VOD provider shall be considered to have low turnover where the undertaking providing the service, including the turnover of any partner or linked enterprise in respect of that service, does not exceed €2 million in the preceding financial year.

10.2.2 For the purposes of Rule 10.2.1, turnover is limited to revenue derived from the VOD service itself (including subscription fees, transactional revenues, and advertising or sponsorship revenues related to the services) and does not include revenues from other business activities such as broadband, telephone or unrelated broadcasting services.

10.2.3 Where the Commission is satisfied that in a particular relevant audiovisual market, a turnover of €2 million would represent 1% or more of total market revenues for comparable services, it may determine a lower turnover threshold for that market, provided that such threshold is reasonable, proportionate, and consistent with the objectives of the Act and the AVMSD. Such determination shall be based on the market share of the undertaking providing the service. The Commission may publish guidance on any such determinations.

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10.3 Low Audience

10.3.1 A catalogue may be considered to have low audience where the VOD provider demonstrates that its share of active users in the relevant audiovisual market is below 1% during the relevant annual period.

10.3.2 For the purposes of Rules 10.3.1:

a) For Subscription VOD services, audience share shall be calculated as the percentage of paying subscribers to the services relative to the total number of paying subscribers to comparable Subscription VOD services in the relevant audiovisual market.

b) For Transactional VOD services, audience share shall be calculated on the basis of the number of unique customer accounts purchasing at least one title, relative to the total number of such customer accounts across comparable Transactional VOD services in the relevant audiovisual market;

c) For Advertising Based VOD services/Free VOD services, audience share shall be calculated as the average number of unique users accessing the service's audiovisual content over the relevant period, relative to the total number of such users across comparable Advertising Based VOD services/Free VOD services, in the relevant audiovisual market.

10.3.3 In determining audience share the Commission may have regard to:

a) Data submitted by the VOD provider including internal analysis;

b) Independent audience measurements data, where available; and

c) Reasonable proxies (such as viewing time shares, subscription ratios, transaction totals or advertising impression shares) where complete audience data is unavailable provided that such proxies are transparent, verifiable, and appropriate to the business model concerned.

10.3.4 The Commission may issue further guidance in relation to this exemption.

10.4 Narrow Subject Matter and Other Statutory Exemptions

10.4.1 In accordance with section 159I(1)-(2) of the Act, the Commission may exempt a catalogue in whole or part from the obligations in sections 159B(1) and/or 159C(1) where it would be impracticable or unjustified by reason of the nature of the service or the general theme of the audiovisual programmes provided.

10.4.2 In exercising this discretion, the Commission shall have particular regard to whether the content on the service:

a) Deals with a narrow subject matter which may not be of general interest to an audience; or

b) May impair the physical, mental, or moral development of children, including programmes featuring gratuitous violence or pornography.

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10.4.3 Without prejudice to the generality of Rules 10.4.2, narrow subject matter exemptions may be considered where:

a) The service's catalogue is dedicated to a highly specialised thematic area (for example single genre, or certain technical, professional or specialist educational content) and the availability of European works within that theme is inherently low.

b) The service is not designed for general entertainment consumption, and the inclusion or promotion of European works would not align with user expectations or editorial intent; or

c) The content offered falls within restricted or protected genres (including adult only content) where the availability of European works is structurally limited or constrained by other regulatory safeguards.

10.4.4 Providers seeking an exemption under Rules 10.4.1 must supply evidence demonstrating:

a) Thematic specialisation: documentation of the service's editorial purpose, genre focused or content mandate;

b) Catalogue structure: information on the composition of the catalogue, including the proportion of works within the narrow subject area and the feasibility of including European works;

c) Market positioning: evidence that the service is not aimed at a general audience and is materially distinct from mainstream entertainment services; and

d) Proportionality considerations: an assessment of whether imposing the 30% quota and/or prominence obligations would fundamentally alter, undermine or be disproportionate to the nature of the service, having regard to the statutory criteria in section 159I(2).

10.4.5 The Commission may, where appropriate determine on its own initiative that a particular service or catalogue is exempt under section 159I(1), without requiring a formal application by the provider, where the nature or theme of the service is clearly evident (for example, in the case of certain adult-only services), provided that the Commission records the basis for such determination.

10.5 Corporation (referred to as Public Service Media)

10.5.1 In considering whether to grant an exemption under Rules 10.2, 10.3 or 10.4 in respect of a public service media service, the Commission shall have regard to:

a) The statutory public service remit application to the provider under the Act;

b) Any existing content, cultural or prominence obligations imposed on the provider under Irish law or under European Union law, including obligations relating to the visibility and accessibility of public service content; and

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c) The role of public service media in promoting European works, cultural diversity and media pluralism; and

d) The role of public service media in promoting pluralism.

10.5.2 Having regard to the matters set out in Rule 10.5.1, the Commission may determine that an exemption from the obligations in section 159B(1) and/or 159C(1) of the Act would not be appropriate in respect of a public service media service, notwithstanding that the service might otherwise meet the criteria for an exemption under these Rules.

10.5.3 Nothing in this Rule shall be taken to preclude the Commission from granting an exemption to a public service media service where it is satisfied, on the basis of the evidence before it, that the exemption is justified, proportionate, and consistent with the objective of the Act and the AVMSD.

11. Monitoring and Reporting

11.1 Annual Compliance Report

11.1.1 Each VOD provider shall submit to the Commission an annual European work compliance report in respect of each registered service and each catalogue falling under the Commission jurisdiction.

11.1.2 The annual compliance report shall be submitted by the end of Q1 of each year and shall cover the preceding calendar year.

11.1.3 The report shall be completed using a standardised reporting template provided by the Commission.

11.1.4 Without prejudice to the generality of Rule 11.1.1, the reporting template may require providers to submit information relating to the composition of the catalogue and the prominence of European works at specified points or periods throughout the reporting year, in order to demonstrate ongoing compliance with the obligations in section 159B(1) and 159C(1) of the Act and these Rules.

11.1.5 The Commission may, from time to time, determine and update through the reporting template or accompanying guidance:

a) The number of reporting reference points to be used during the year;

b) Whether such reference points are based on specific dates, representative periods, or other defined sampling methodologies; and

c) The form and level of detail of information to be provided in respect of each reference point.

11.1.6 A VOD provider shall ensure that the information submitted in respect of each reference point is accurate, complete and capable of verification, and that appropriate records are retained in accordance with Rules made under section 159B(6) and 159C(6) of the Act.

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11.2 Reporting for Exemptions

11.2.1 A VOD provider seeking to rely on an exemption under Rule 10 shall include in its annual compliance report, or submit separately in accordance with directions issued by the Commission, evidence supporting the basis of the exemption, including, as applicable:

a) Turnover data and market data relating to the undertaking providing the service, for low turnover exemptions;

b) Audience metrics or reasonable proxies, together with an explanation of the methodology used, for low-audience exemptions; and

c) Documentation relating to catalogue composition, editorial purpose, market positioning or service characteristics for narrow subject matter or other statutory exemptions.

11.2.2 The Commission may request such further information, explanations or calculations as it considers reasonably necessary to assess eligibility for an exemption.

11.2.3 An exemption granted under these Rules shall apply only to the catalogue and reporting period to which it relates, unless otherwise specified by the Commission.

11.3 Monitoring and Verification

11.3.1 The Commission shall monitor compliance with section 159B and 159C of the Act and these Rules in a proportionate, transparent, and evidence-led manner, having regard to the nature, scale and risk profile of the service concerned.

11.3.2 The processes, methodologies, and verification measures used for monitoring compliance may be set out in guidance issued by the Commission and may be updated from time to time.

11.3.3 Monitoring is an oversight function distinct from enforcement. Where monitoring identifies potential non-compliance, the Commission shall ordinarily seek to address the matter through engagement and corrective steps before considering escalation to investigation under Part 8B of the Act. This does not prejudice the Commission to initiate enforcement action under Part 8B without prior engagement where appropriate.

11.3.4 For the purposes of section 159B (6) and 159C(6) of the Act, a VOD provider shall maintain such records and systems as are reasonably necessary to demonstrate compliance with these Rules, in accordance with any requirements set out in guidance issued by the Commission.

12. Compliance and Enforcement

12.1 The Commission may take such steps as are available to it under the Act to monitor, investigate and enforce compliance with the obligations and these Rules.

12.2 Without prejudice to the generality of Rule 12.1, a failure by VOD provider to comply with the statutory obligations in section 159B and 159C of the Act, or with Rules made under those sections, may give rise to enforcement action in accordance with Part 8B of the Act.

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12.3 In exercising its enforcement functions, the Commission shall act in a manner that is lawful, proportionate, and procedurally fair, having regard to the nature and seriousness of any apparent non-compliance and any steps taken by the provider to remedy it.

13. Review of the Rules

13.1 These Rules commence on [INSERT DATE] and may be cited as the Rules of the Commission under Part 10A of the Broadcasting Act 2009 and may be amended and/or superseded by such further or other Rules as may be made by the Commission from time to time.

13.2 The Commission shall keep these Rules under review to ensure that they remain effective, proportionate, and consistent with the objectives of the Act and the AVMSD.

13.3 The Commission may, following consultation with stakeholders and having regard to relevant guidance issued by the European Commission, amend these Rules where it considers it necessary or appropriate.

13.4 A formal review of these Rules shall take place at least once every five years, or sooner where the Commission considers it necessary or appropriate, included (but not limited to) when there is a material change in:

i. European Union law or guidance relevant to Article 13 AVMSD;

ii. The Irish statutory or regulatory framework governing audiovisual media services; or

iii. Significant development in the audiovisual media services market that materially affect the operation of these Rules.

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Appendix 1 - Definition of European Works

Section 159A of the Broadcasting Act 2009 provides the following interpretation of European works—

(1) For the purposes of this Act, subject to subsections (2) and (3), the following are European works:

(a) works originating in Member States;

(b) works originating in third countries that are European states party to the European Convention on Transfrontier Television of the Council of Europe done at Strasbourg on 5 May 1989;

(c) works that do not fall within paragraph (a) or (b), that are co-produced within the framework of agreements related to the audiovisual sector concluded between the European Union and third countries, and that fulfil the conditions defined in those agreements;

(d) works that do not fall within paragraph (a), (b) or (c), and that are co-produced within the framework of bilateral co-production agreements concluded between Member States and third countries, provided that—

(i) the co-producers from the Member States supply a majority share of the total cost of production, and

(ii) the production is not controlled by one or more co-producers established in a third country.

(2) Subsection (1)(b) and (c) do not apply in the case of a third country if works originating in Member States are the subject of discriminatory measures in that country.

(3) A work falls within paragraph (a) or (b) of subsection (1) only if it is mainly made with authors and workers residing in one or more of the states referred to in those paragraphs and meets one of the conditions in subsections (4) to (6).

(4) The first condition is that the work is made by one or more producers established in one or more of those states.

(5) The second condition is that the production of the work is supervised and controlled by one or more producers established in one or more of those states.

(6) The third condition is that there are co-producers, including one or more established outside those states, but—

(a) the contribution of co-producers established in those states to the total co-production costs is preponderant, and

(b) the co-production is not controlled by one or more co-producers established outside those states.

(7) In this section, "third country" means a state other than a Member State.]

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