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Subject: State aid SA.31851 (N499/2010) – Italy – Broadband Marche

Sir,

I. SUMMARY

- (1) I am pleased to be able to inform you that the European Commission has assessed the measure "*Broadband Marche*" and decided not to raise objections, as the State aid contained therein is compatible with Article 107(3)(c) Treaty on the Functioning of the European Union (TFEU)¹.

II. PROCEDURE

- (2) Following pre-notification discussions, with a letter registered on 2 November 2010, the Italian authorities notified to the Commission pursuant to Art. 108(3) of the TFEU their project to support the development of broadband connectivity in Marche. The Commission requested additional information on 22 December 2010. The notification was completed by additional submissions dated 29 December 2010, 25 January and 25 March 2011.

¹ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

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III. CONTEXT

- (3) It is widely acknowledged that broadband connectivity is a strategic enabling factor in the transition towards the digital economy, in which information and communication technologies are a key factor to foster economic growth, social development, innovation and ultimately a higher quality of life.
- (4) Marche is an Italian region characterised by specific geo-morphological features of mountainous areas just behind the more flat ones on the coast. For a number of historical, economic and social factors, certain constraints exist to the development of high-speed broadband networks:
 - (a) a majority of small and rural municipalities with an aging population;
 - (b) prevalence of small and medium-sized enterprises belonging to a number of industrial districts spread even in the remote areas of the Region;
 - (c) significant differences between the level of economic development between the coastal areas and the mountainous ones.
- (5) The abovementioned factors represent serious obstacles to the sustainability of private investments in the most remote areas of the region. The lower population density, high cost of network deployment and delocalisation of production contribute to widen further the divide between the disadvantaged areas and the more developed ones of Italy and Europe.
- (6) To bridge this divide and to provide to all citizens access to the most advanced services of the information society (tele-medicine, video-surveillance, e-learning, tele-working e-Government) the strategy of the Marche region is to incentivise the deployment of broadband networks able to provide 20 Mbps by 2013 and at least 30 Mbps by 2020. Marche considers this strategy coherent with the vision developed at national and at European level of achieving universal connectivity to all citizens by 2013 and providing services of 30 Mbps to all citizens and over 100 Mbps to at least 50% of all Europeans by 2020².

IV. DESCRIPTION OF THE MEASURE

- (7) Objectives of the measure: The Marche region recognises the crucial role that broadband networks play as a tool to increase productivity and competitiveness and to spur long-term growth. The project seeks to achieve a step change to the broadband system in Marche in areas with no broadband connectivity or low broadband speeds. In order to offer enhanced access to broadband technology, the regional authorities target their intervention along the

² A Digital Agenda for Europe. COM/2010/0245 f/2

pre-announced lines of the broader Italian national strategy³. In this sense, there are three lines of intervention:

- (a) Extend backhaul coverage, in line with the existing National Rural Broadband Programme⁴ and of future interventions planned by the central national government.
 - (b) Incentivising commercial operators to provide Internet enhanced connectivity in currently underserved areas.
 - (c) Direct public intervention to rollout a complete infrastructure in marginal areas of the region.
- (8) The intervention of Type (a) is not subject to the present notification, as it will be carried out as implementation of the national broadband plans. The rationale for distinguishing type (b) and (c) is that the former is a real form of profitability gap funding and cannot cover more than 40% of the costs of the operator. By contrast, the latter addresses a market failure affecting certain marginal areas which is so serious that gap-funding to private operators would not be enough to incentivise them to invest into their own network. Hence, the Region will step in by funding a complete infrastructure, which will remain in public ownership (of the provinces) and will be given in use to the selected operator to provide services to citizens and businesses in the area. Logically, the two lines of intervention are mutually exclusive and cannot overlap in the same areas. The selected operators will be required to provide minimum nominal speed of at least 10 Mbps up to 20Mbps⁵, with minimum download guaranteed speeds of 2 Mbps for residential customers and of 4 Mbps for business customers to at least 95% of the population. The completion of the works should take place within 12 months from the moment the beneficiary enters into the contract with the granting authorities.
- (9) *Mapping exercise and stakeholders consultation:* Since 2009, the Regional authorities have carried out a survey of existing infrastructures by publishing an open call to all telecommunications operators to get involved with the Region and define mutual commitments for broadband development. In this occasion, the Region acquired both the actual and the planned coverage data of each operator who responded to the call. As a result, fourteen operators signed a Memorandum of understanding with the Region. Other Memorandums of understanding entered into with associations of municipalities and of SMEs have allowed further sharing of information to determine the level of coverage and of planned investments. An external consultant hired by the Region provided a report on the market failure existing on the regional territory with regard to broadband coverage. Finally, a public consultation has been launched on the Region's website⁶ sharing with all

³ The Italian national plans are currently being finalised with the dual intervention lines of 1. Fighting the digital divide and 2. Favouring the transition to next generation networks.

⁴ Commission Decision of 30/04/2010 N 646/2009 National broadband plan for rural areas in Italy

⁵ The Regional authorities underline that this is not a ceiling: bidders proposing technologies able to provide higher speeds will be considered as well but it is considered highly unlikely that such bids will be proposed, given the limited budget.

⁶ <http://www.ecommunity.marche.it>

stakeholders and with the general public the characteristics of the intervention and the targeted areas and asking to disclose investment plans within the next three years.

- (10) Targeted areas: The measure will target only those areas meeting the conditions to be considered “white areas” according to the definition of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*⁷ (hereinafter: “Broadband Guidelines”). These areas correspond to the municipalities (or parts of them) situated in the most remote and mountainous areas of the region and identified as white during the course of the mapping exercise and public consultation.. The Italian authorities drew up a list of such areas. On the basis of such list and of the information gathered during the course of the public consultation, the exact identification of the targeted zones will take place during the course of the tender procedures to select the aid beneficiaries.
- (11) Legal Basis: The legal basis for the measure includes the Legislative Decrees of 1 August 2003 n.259: “Codice delle comunicazioni elettroniche” and of 7 March 2005 n. 82: “Codice della pubblica amministrazione digitale”, and the Deliberation of the Regional Council n. 95 of 15/07/2008 “Piano telematico regionale per lo sviluppo della banda larga”.
- (12) Procurement and award criteria: The aid will be allocated on the basis of an open tender. The award criterion is the most economically advantageous offer. The tender documents detail the admissible costs and the relevant award criteria. The bids will be scored based on financial aspects such as the level of subsidy requested (max. 15 points) and technical factors such as coverage, speed, other technical features and prices of the services proposed (max. 85 points). The competitive tender procedure will also allow to identify which areas will be subject to each type of intervention.
- (13) Technology neutrality and existing infrastructure: The measure is technologically neutral, allowing bidders to propose any suitable technological solution, both wired and wireless. The project expressly foresees that the beneficiary will be able to use own or third parties' existing (telecoms and non-telecoms) infrastructures wherever available so as to avoid duplication.
- (14) Wholesale supply and tariffs: As foreseen already in the tender documents, the aid beneficiary of interventions of both type (b) and (c) shall grant, regardless of the significant market power possibly held,⁸ wholesale access to the subsidised network to all operators at fair, reasonable and non-discriminatory conditions. Applicable access conditions will be benchmarked with those prevailing in other areas of Italy (or, if necessary, of other countries) where the services are already offered or, in any case, at the conditions set or approved by the National Regulatory Authority.
- (15) Monitoring and clawback mechanism: The contract with the beneficiary will also contain a clawback clause that will ensure that if the beneficiaries obtain higher revenues than

⁷ OJ C 235 of 30.9.2009, p. 7.

⁸ This provision does not encroach on the national regulatory provisions on significant market power and does not prevent NRAs to impose access obligations and other asymmetric measures which the market conditions might require.

foreseen, the exceeding amount will be paid back to the provincial government or re-invested for further infrastructure rollout. The Italian authorities estimated that a 10% return on investment is an accurate prediction of the normal returns in the sector, on the basis of analysis of the national and international experiences and in line with previous practice of the European Commission⁹.

- (16) The granting authority will carry out appropriate audit activities and the beneficiaries will give access to its accounting reports. The beneficiaries are required to keep accounting separation for their wholesale and retail operations and report to the granting authority every 6 months and the total duration of the monitoring activity will be of 4 years starting from the beginning of the operations on the network.
- (17) Beneficiaries: The direct beneficiaries of the aid will be the selected electronic communications operators offering broadband services. Indirect beneficiaries will be third party providers of telecommunication services and local SMEs in the targeted areas.
- (18) Budget, intensity and duration of the aid: The budget for the measure amounts to up to EUR 2,9 million for the intervention of type (b) and EUR 4,56 million for the intervention of type (c), coming mostly from the European Regional Development Funds. For type (b) the aid intensity cannot exceed 40% of the costs for the activation of the network and provision of services. For type (c), the aid will cover 100% of the costs of a complete infrastructure. Finally, the aid cannot be cumulated with other State aid (for example the aid authorised by decision N 646/2010).

V. STATE AID ASSESSMENT OF THE MEASURE: PRESENCE OF AID

- (19) According to Article 107(1) of the TFEU, “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”. It follows that in order to be qualified as State aid, the following cumulative conditions have to be met: 1) the measure has to be granted out of State resources, 2) it has to confer an economic advantage to undertakings, 3) the advantage has to be selective and distort or threaten to distort competition, 4) the measure has to affect intra-Community trade.
- (20) State resources: The current measure will be financed by state resources, namely by resources of the Marche region.
- (21) Economic advantage: Although a competitive tender procedure tends to reduce the amount of financial support required, the selected operators will receive financial support or the possibility to use a complete infrastructure rolled out by the region. Hence, they will be enabled to enter the market and provide broadband services at conditions not otherwise available on the market. The selected operator will, in type b) of the intervention also acquire ownership of the network as well as other tangible and intangible assets with State funds (e.g. equipment, customer relations) even after the lifetime of the projects. In view of the above, it is clear that an economic advantage will be granted to the selected operators.

⁹ See for example Commission Decision in case N 596/2009 – Bridging the digital divide in Lombardia.

- (22) Moreover, third party providers of broadband services will be able to access the enhanced network under non discriminatory terms and they will therefore also indirectly benefit from the state resources.
- (23) Finally, the measure aims at improving the provision of existing broadband services to business users. Businesses in the targeted areas will therefore ultimately benefit from the improved service.
- (24) Distortion of competition: The intervention of the State alters the existing market conditions. It will provide a selective advantage to the bidders prevailing in the tender procedures and will moreover benefit all third party providers who use the improved infrastructure to compete with other third party providers.
- (25) In addition, despite the Italian authorities intervene only in those areas in which private initiatives are not going to take place, it cannot be excluded that commercial operators may find it viable to invest in some of the targeted areas in the long term. The aid beneficiaries will, thus, establish their business and develop their customer base earlier than prospective competitors, enjoying a first mover advantage.
- (26) The scheme is also selective in that it is addressed to undertakings active only in certain regions and/or in a specific sector (provision of broadband services), to the exclusion of other electronic communications services and other economic activities. These selectivity elements also induce a potential distortion of competition.
- (27) Effect on trade: Insofar as the intervention affects providers of electronic communications services from other Member States, the measure has an effect on trade. The markets for electronic communication services are open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. There may also be an effect on trade between the businesses using the broadband services enabled by the measure and their competitors in other Member States.
- (28) Conclusion: Having established that the project involves aid within the meaning of Article 107(1) of the TFEU to the selected service provider, third party providers and businesses, it is necessary to consider whether the measure can be found to be compatible with the internal market.

VI. COMPATIBILITY ASSESSMENT

- (29) The Commission has assessed the compatibility of the scheme according to Article 107(3)(c) of the TFEU and in the light of the *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*¹⁰ (hereinafter the "Broadband Guidelines").
- (30) The Broadband Guidelines contain a detailed interpretation of Article 107(3)(c) of the TFEU in this area of State aid law. As regards the applicable substantive provisions, the

¹⁰ *Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks*, OJ C 235, 30.9.2009, p.7.

Commission has analysed the measure in the light of the criteria developed in paragraphs 31-51 of the Broadband Guidelines.

The balancing test and its application to aid for broadband network deployment

- (31) As described in points 34 and 35 of the Broadband Guidelines, in assessing whether an aid measure can be deemed compatible with the internal market, the Commission balances the positive impact of the aid measure in reaching an objective of common interest against its potential negative side effects, such as distortions of trade and competition.
- (32) In applying this balancing test, the Commission will assess the following questions:
- a. Is the aid measure aimed at a well-defined objective of common interest (*i.e.* does the proposed aid address a market failure or other objective)?
 - b. Is the aid well designed to deliver the objective of common interest? In particular:
 1. Is the aid measure an appropriate instrument, *i.e.* are there other, better placed instruments?
 2. Is there an incentive effect, *i.e.* does the aid change the behaviour of firms?
 3. Is the aid measure proportional, *i.e.* could the same change in behaviour be obtained with less aid?
 - c. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?
- (33) The individual steps of the balancing test in the field of broadband are set out in detail in Sections 2.3.2 and 2.3.3 of the Broadband Guidelines.

Objective of the measure

The aid is in line with the Community policy

- (34) Broadband is of strategic importance for the European countries, because of its ability to contribute to growth and innovation in all sectors of the economy and to social and regional cohesion¹¹. Investments in broadband will have to come primarily from commercial operators. However, due to the economic characteristics of the industry, private investments alone will not suffice to attain such ambitious coverage goals and governments will have to step in with the smart (and pro-competitive) use of public funds¹² to extend high-speed network coverage to those areas in which market operators are unlikely to invest on commercial terms.

¹¹ See for instance “i2010 – A European Information Society for growth and employment, COM(2005)229 final, 1 June 2005; “eEurope 2005: An information society for all” COM(2002)263 final, “Bridging the broadband gap”, COM(2006)129.

¹² The Digital Agenda (in Key Action 8) calls Member States “to use public financing in line with EU competition and State aid rules” in order to meet the coverage, speed and take-up targets defined in Europe 2020.

- (35) By many policy instruments, the Commission has stated its aims to support State intervention to ensure widespread availability of broadband, as long as public funding of broadband infrastructure a “*smart investment*”, able to provide short term (employment)¹³ benefits and long term (economic) advantages for the EU economies. A smart investment not only contributes to and incentivises infrastructure development, but also favours the creation of a more open and competitive landscape in electronic communications – perhaps making, by the same token, also their regulation easier in the future.
- (36) Hence by accelerating broadband deployment, the current measure is also in line with the European interest to support fast recovery of the European economies and long-term competitiveness objectives¹⁴.
- (37) A well targeted State intervention in the broadband field contributes to bridge the '*digital divide*' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not. The notified measure addresses a market failure as it targets areas where, due to difficult geographic conditions and/or low density of the population, adequate broadband is currently not available and where there are no plans by private investors to roll out such infrastructure in the near future.
- (38) The measure at hand forms an important part of the broadband strategy in Marche and is in line with the broader Italian national strategy. By improving broadband access for citizens and businesses in mountainous and sparsely populated areas of Marche where these services are not yet available or are available at a low broadband speed, the measure helps achieving greater cohesion and is therefore in line with the common interest.

Well-designed aid

Aid is the appropriate instrument

- (39) The mapping exercise and public consultation conducted by the Italian authorities have highlighted that it is highly unlikely that broadband services would be provided in the targeted areas. In such areas, the existing bandwidth speed is non-existing or insufficient for the needs of local citizens and businesses in the short term. The measure is designed in such a way as to be the minimum service to bring the biggest benefits to the largest number of citizens and SMEs and aims at achieving the ambitious goals set in the Digital Agenda¹⁵ of the Commission. Supporting an NGA project is not excluded but due to the limited budget, the Italian authorities concluded that the delivery of a end-to-end fibre optic access network did not represent the best value for money at this time,¹⁶ although it will be pursued in the future as part of the comprehensive national broadband strategy. This decision therefore does not cover any support to NGA projects. Given the very small and mountainous zones of Marche, there are no plans for affordable broadband coverage

¹³ See also Katz et al. (2009) in the paper of "*The Impact of broadband on jobs and the German economy*" estimate that broadband network development within the framework of the National Broadband Strategy of Germany could create 407.000 jobs between 2010 and 2014 as a result of network construction and network externalities.

¹⁴ Communication from the Commission to the European Council: *A European Economic Recovery Plan*, Brussels, 26.11.2008.

¹⁵ Communication of the Commission "A Digital Agenda for Europe", 26.8.2010 COM(2010) 245 final/2

¹⁶ In the same sense, see Commission Decision of 05.11.2009, N 418/2009 – Northern Ireland Next Generation Broadband, C(2009)8687

of this speed in the areas concerned in the next three years due to the limited profitability of such an endeavour.

- (40) Based on the information provided by the Italian authorities, in view of the limited availability of broadband in mountainous and remote areas of Marche, the Commission considers that the support provided by the notified measure is an appropriate instrument to achieve the set objectives.

The aid provides the right incentives to operators

- (41) As set out in paragraph 50 of the Broadband Guidelines, regarding the incentive effect of the measure, it needs to be examined whether the broadband network investment concerned would not have been undertaken within the same timeframe without any State aid. According to the data presented by the Italian authorities and validated through the public consultation, in the targeted areas no investment would take place without public funding within three years. In the areas targeted by intervention of type (b) the public contribution is essential to fill the profitability-gap; in the areas targeted by intervention of type (c) there would not be any access infrastructure if not completely rolled out by the public authorities, which would enable commercial operators to provide connectivity services to end-users.
- (42) Hence the aid produces a change in the investment decisions of the operators. Moreover, as explained above, the beneficiaries of the measures will be selected by public tender. Bidders will submit investment plans indicating the amount of aid that they consider to be necessary to carry out the investment given the anticipated investment and operating costs and revenues. This will allow to distinguish the areas (b) or (c) and as a result, the aid should provide a direct and appropriate investment incentive for the selected operator.

Proportionality

- (43) The Regional authorities have designed the measure in such a way as to minimise the State aid involved and potential distortions of competition arising from the measure. In this respect, the Commission notes, *inter alia*, the following positive elements in the design of the measure:
- (a) *Detailed mapping and coverage analysis, consultation with stakeholders:* as described above in paragraph (9), the Italian authorities have undertaken a thorough analysis of the existing broadband infrastructures in order to identify the areas where public intervention is necessary. All stakeholders have been given the opportunity to participate to the public consultation and present their existing and planned investments. By consulting existing operators in an open and transparent manner, the Italian authorities ensure that public funds are used only in areas where it is necessary and limits the possibility of crowding out private investments and distorting competition to the minimum possible.
- (b) *Open tender process:* the Marche region will select the beneficiaries of the two types of aid measures through open and transparent competitive procedures, with the application of the principles and safeguards provided for by the rules on public procurement, in accordance to national and European legislation. Open tender procedures are considered to be effective means to minimise the amount of aid necessary for the measure.

- (c) *Most economically advantageous offers*: within the context of an open competitive procedure, the Italian authorities will select the most economically advantageous offers among those presented by the operators. Pursuant to the Broadband Guidelines, the awarding criteria are established in the call for tender and the awarding authority specifies in advance the relative weighting which it will give to each of the qualitative criteria chosen as explained above in paragraph (12). At similar quality conditions, the bidder with the lowest amount of aid requested should receive more priority points in the assessment of its bid.
- (d) *Technology neutrality*: The current measure does not favour any particular technology or network platform leaving it to commercial operators to come up with the most appropriate technological solutions to provide broadband services to end users. The Italian authorities expect a mix of different technologies to be the best way to achieve universal coverage.
- (e) *Wholesale access and price benchmarking*: The selected operators will have to provide access to the subsidised networks to other operators on equal and non-discriminatory terms for at least seven years at the conditions prevailing in other more competitive areas or, in any event, in the absence of such published prices, at the conditions set or approved by the National Regulator for the markets and services concerned. Access will have to be granted at all possible level of the infrastructure, both active and passive and for all available products: for wired (access) segments: ducts, street cabinets, ULL and bitstream at the same conditions approved by the national regulator for the incumbent operator; for wireless (access) segments: physical or bitstream access at cost-oriented prices and in any event at prices prevailing on more competitive areas; for backhaul segment: access to the passive infrastructure at conditions corresponding to the national or international benchmarks, such as the latest Reference offer by the incumbent operator.
- (f) *Opinion of the Regulatory and Competition authorities*: Although not required for interventions only aiming at tackling the basic broadband digital divide, the Italian authorities consulted both the National Regulatory Authority AGCOM and the Competition authority AGCM on the notified project. The positive opinion of the sectoral regulator commended the pro-competitive aspects of the measure at hand and focused on the access obligations as a tool to promote competition in the electronic communication sector in the targeted areas. AGCOM stressed in particular the necessity to grant access to the subsidised networks at both passive and active levels. The Italian authorities share the views of the national regulator and committed to implement such suggestions in the tender documents.
- (g) *Use of existing infrastructure*: Bidders will be able to use not only their own infrastructure but also any existing regional or third parties' infrastructure in order to limit duplication. This may be liable to enhance economic efficiency and limit the economic impact for operators that may already have infrastructure in place. The weighing of the award criteria in the tender as well the access obligation imposed via administrative measures or sectoral regulation ensure that no undue advantage is granted to the incumbent operator.
- (h) *Monitoring and clawback provision*: The monitoring provisions and clawback mechanism described above in paragraph (15) are adequate instruments to ensure

minimization of aid ex post: in case of higher revenues than initially foreseen, the return in excess of 10% will be repaid to the granting authority or re-invested to increase the reach of the subsidized network.

The distortions of competition and the effect on trade are limited, so that the overall impact of the measure is positive

- (44) The Commission concludes that the notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of availability of enhanced broadband services due to the commercial unattractiveness of upgrading existing broadband services in the targeted areas.
- (45) In view of the characteristics of the project and of the safeguards applied by the Italian authorities, the overall impact on competition is deemed to be positive. On the effect on trade, the Commission does not identify negative spill-over for other Member States.
- (46) The Commission reminds the Italian authorities that in case of co-financing through Structural Funds of the Union, the rules applicable to these Funds must be respected and in particular the provisions laid down in Council Regulation (EC) No 1083/2006 ("General Regulation on Structural Funds") and Regulation (EC) No 1080/2006 of the European Parliament and of the Council ("ERDF Regulation").
- (47) On balance, the Commission concludes that the overall effect of the measure is deemed to be positive. The measure is clearly in line with the objectives of Article 107(3)(c) of the TFEU as it facilitates the development of certain economic activities (broadband services) in certain remote and rural areas. The intervention is designed in a way that does not distort competition or adversely affect trading conditions to an extent contrary to the common interest.

Conclusion

- (48) The Commission concludes that the compatibility criteria set out in the Broadband Guidelines are met, hence the aid involved in the notified measure is compatible with Article 107(3)(c) of the TFEU.

VII. DECISION

- (49) On the basis of the foregoing assessment, the Commission has accordingly decided that the aid measure "*Broadband Marche*" is compatible with Article 107(3)(c) of the TFEU.
- (50) The Italian authorities are reminded that, pursuant to Article 108(3) of the TFEU, they are obliged to inform the Commission of any plan to extend or amend the measure.
- (51) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the internet site:

http://ec.europa.eu/eu_law/state_aids/state_aids_texts_en.htm

Your request should be sent by encrypted e-mail to stateaidgreffe@ec.europa.eu or, alternatively, by registered letter or fax to:

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Yours faithfully,
For the Commission

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