LMA Loan Market Association

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SUBMITTED VIA EMAIL

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Re: Financial Conduct Authority Consultation Paper CP23/17: Rules relating to Securitisation and Prudential Regulation Authority Consultation Paper CP15/23: Securitisation: General Requirements

On behalf of The Loan Market Association (the "**LMA**"), we welcome the opportunity to respond to (i) the Financial Conduct Authority's (the "**FCA**") Consultation Paper CP 23/17: Rules relating to Securitisation of 7 August 2023[1], as supplemented by the addendum published by the FCA on 16 October 2023[2] (the "**FCA Consultation Paper**") setting out the draft Securitisation (Smarter Regulatory Framework) Instrument 2023 (the "**FCA Draft Rules**") and (ii) the Prudential Regulation Authority's (the "**PRA**") Consultation Paper CP 15/23 – Securitisation: General Requirements of 27 July 2023[3] (the "**PRA Consultation Paper**" and, together with the FCA Consultation Paper, the "**Consultation Papers**") setting out the draft PRA Rulebook: CRR Firms, Non-CRR Firms, Solvency II Firms, Non-Solvency II Firms: Securitisation Instrument [2024] (the "**PRA Draft Rules**"). References in this response to the FCA Consultation Paper shall include the FCA Draft Rules and to the PRA Consultation Paper shall include the PRA Draft Rules. The continuing engagement of the FCA and the PRA with market participants on issues related to the securitisation market and, in particular, CLOs, is greatly appreciated.

The LMA was established in 1996 and is headquartered in London. Our key objective is improving liquidity, efficiency and transparency in the primary and secondary syndicated loan markets in Europe, the Middle East and Africa ("**EMEA**"). By establishing sound, widely accepted market practice, we seek to promote the syndicated loan as one of the key debt

[1] https://www.fca.org.uk/publications/consultation-papers/cp23-17-rules-relating-securitisation

[2] https://www.fca.org.uk/publication/consultation/cp23-17-addendum.pdf

[3] https://www.bankofengland.co.uk/prudential-regulation/publication/2023/july/securitisation

products available to borrowers across the region. Our membership has grown steadily and currently stands at over 849 organisations covering 69 countries, comprising commercial and investment banks, institutional investors, law firms, service providers, rating agencies and regulatory and governmental bodies. The LMA's overall mission is to act as the authoritative voice of the EMEA loan market vis à vis lenders, borrowers, regulators and other interested parties.

A syndicated loan is a financing offered by a group of lenders – collectively referred to as a syndicate – each of which funds a portion of a loan or credit line made under a facility agreement with a borrower. The borrower under a syndicated loan may be a corporate or corporate group, a smaller listed company or a private unlisted company. Where the syndicated loan is financing real estate, infrastructure or other assets the borrower may instead be a corporate established for the purpose of owning and/or operating the relevant assets.

During its history, the LMA has played a key role in developing standard form documentation for documenting syndicated loans and forms of documentation and practices for secondary market trading in syndicated loans. Our work has contributed to widening and deepening the syndicated loan market in EMEA, reducing barriers to accessing capital, and increasing liquidity of assets for investors.

Our representations in respect of the Consultation Papers are limited to managed collateralised loan obligations ("**CLOs**") as opposed to other securitisations, in the hope that we can engage in productive dialogue with the FCA and the PRA in relation to that asset class. The LMA would be pleased to provide additional information on the CLO market following the closure of these consultations.

In addition to responding to the specific questions raised in the FCA Consultation Paper related to managed CLO transactions, we would like to raise a number of observations in response to the Consultation Papers.

Please note that references in this section to CLOs only includes CLOs which primarily invest in UK and EU corporate loans.

General observations

1. Managed CLOs and STS

Our view is that it should be possible for managed CLOs to achieve simple, transparent and standardised ("**STS**") status, and for investors to thereby benefit from the associated regulatory capital treatment. Amending the STS criteria to permit the inclusion of some or all CLO structures would, in our view, help increase the volume of STS transactions and support the recovery of the UK securitisation market and the wider UK economy by providing essential funding to UK corporates. CLOs participate as lenders in 56[4] % of the broadly syndicated leveraged loan market in the UK and Europe and are an important funding tool for corporates, particularly corporates who are unable to access funding through the investment grade corporate bond market. The presence of diversified funding options for UK corporates is an essential component to growing the UK economy. As a result, increasing the number and type of investors who can efficiently invest in CLOs will make more capital available to UK corporates and better reflect the performance of this asset class over the last couple of decades.

[4] As at 2021

The current risk weightings of CLO notes, particularly for UK insurers, is excessively high when contrasted with the performance of this asset class and thus has inhibited some types of investors from investing in CLOs despite their relative value and performance.

Securitisations of syndicated loans, such as CLO transactions which generally comprise portfolios of 30-60 loans to corporates, have proven resilient throughout both the global financial crisis and the more recent market disruption resulting from the global pandemic. In May 2023 Standard & Poor's published its 2022 Annual Global Leveraged Loan CLO Default and Rating Transition Study, which considered annual default rates of CLOs for the period from 2001 to the end of 2022. As set out in the study:

(i) in each year during that period the annual default rate of CLOs was a fraction of the annual default rate of investment grade corporate debt; and

(ii) in no year during that period has the annual default rate of CLOs exceeded 0.5% and in the year 2022, the global annual default rate for the security was 0.05%.[5]

It is also worth noting that the resilience of CLO transactions is further exemplified by the fact that since the establishment of the European CLO 2.0 in the post global financial crisis period, not one of these securities has defaulted[6]. Furthermore, despite the credit deterioration seen subsequent to the beginning of the Covid-19 pandemic, only one CLO 1.0 tranche defaulted in 2020, reduced from three the previous year.

We would be happy to provide data in support of this and would be happy to arrange a time to discuss the CLO market and the operation of CLOs in more detail.

2. Inconsistencies in Draft Rules

It is expected that the FCA Draft Rules, the PRA Draft Rules and the Securitisation Regulations 2023 draft statutory instrument (the "**SI**") published by HMT on 11 July 2023[7], when finalised, will together set out all relevant provisions replacing the UK Securitisation Regulation. With this in mind, the LMA is keen to work with the FCA and the PRA so that the final provisions are cohesive and complete. Consistency throughout the FCA Draft Rules, the PRA Draft Rules and the SI is required in order to avoid unnecessary complexity and risk in analysing any differences, as well as the inevitable uncertainty that is generated by parallel yet inconsistent regimes.

We note that the FCA and PRA are generally aligned in their approach to the repeal and replacement process in relation to the UK Securitisation Regulation. However, a comparison of the drafting shows unexpected differences in the language where no policy differences are evident from the Consultation Papers. We note that the SI requires the FCA and PRA to "have regard" to the coherence of the overall framework for the regulation of securitisation.

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[5] https://www.spglobal.com/ratings/en/research/articles/230526-default-transition-and-recovery-2022-annual-global-leveraged-loan-clo-default-and-rating-transition-study-12741307

[6] As of 26th May; 2023 Standard and Poor's Global Ratings. https://www.spglobal.com/ratings/en/research/articles/230526-default-transition-and-recovery-2022-annual-global-leveraged-loan-clo-default-and-rating-transition-study-12741307

[7] https://www.gov.uk/government/publications/securitisation-regulations-2023-draft-si-and-policy-note

Accordingly, we would request that the FCA Draft Rules and the PRA Draft Rules are aligned where there is no policy reason for there to be a difference in the drafting (and we are not aware of any policy differences between the two regulators).

The misalignment includes what appear to be minor drafting points, but which may (we assume inadvertently) lead to increased risk of interpretational uncertainty or differences in approach.

a. An example of where the FCA Draft Rules, the PRA Draft Rules and the SI should be aligned would be the various defined terms that are used across the three elements of the replacement for the UK Securitisation Regulation. The LMA would suggest that unless policy decisions dictate that definitions should differ, only one definition is included for each term and is cross referred to in the other elements. In doing so, the FCA and PRA can protect against increased transactional costs, divergent analysis and potential uncertainty.

b. A further example relates to guidance on the retention of the first loss tranche (see SECN 5.2.17R(1)(b) of the FCA Draft Rules and Chapter 3, Article 7 of the Securitisation Part of the PRA Draft Rules). The draft rules provide for retention by holding a first loss tranche by overcollateralisation. The PRA Draft Rules use the concept of "*overcollateralisation*" as referred to in point (9) of Article 242 of CRR. However, the FCA Draft Rules use the term "*over collateralisation*" and such term is as defined in the Glossary of definitions of the FCA Handbook. The definitions are the same, but the difference in language in the provisions creates the need for additional analysis which is inefficient and carries a likely cost element.

c. The LMA notes that the drafting in the FCA Draft Rules (at SECN 5.2.11R) and the PRA Draft Rules (at Chapter 3, Article 2(6) of the Securitisation Part) in relation to the 'sole purpose test' is similar but does not match. It would be appreciated if the two provisions could be aligned so as to avoid any unnecessary or unintentional divergence.

The LMA notes that the above points are non-exhaustive examples of discrepancies or potential inconsistencies. We would be happy to discuss any further differences if helpful.

3. Equivalence

The LMA would be interested in discussing with the FCA and PRA the potential of an equivalence regime such that:

a. UK institutional investors investing in 'securitisations' with no UK original lender, sponsor, originator or SSPE may rely on compliance with an 'equivalent' retention regime that is recognised by the FCA and PRA as sufficient to discharge their due diligence obligations under the recast UK Securitisation Regulation. This aligns with the FCA's principles-based and proportionate approach and would allow for significant efficiencies (in terms of cost and time) and certainty in the market without compromising the investor protections intended by the retention requirements; and

b. The majority of EU/UK CLO managers are based in the UK and thus would be required to comply with the UK Securitisation Regulation transparency regime

as well as the EU Securitisation Regulation transparency regime given the large European investor base. To the extent the two reporting regimes diverge, the costs of compliance for UK CLO managers will increase as there will be a requirement to report using the UK templates and the ESMA templates thus increasing compliance costs and time for UK CLO managers. This could easily be mitigated by providing that reporting using the ESMA templates would be sufficient for a UK originator, sponsor or SSPE to discharge its reporting obligations under the UK Securitisation Regulation. Again, this would align with the FCA's principles-based and proportionate approach and would allow for significant efficiencies (in terms of cost and time) and certainty in the market without compromising the investor protections intended by the transparency requirements.

We believe that equivalence measures described above would align with the outcomes sought by the FCA in their proposal to encourage the issuance of and investment in securitisations with minimal additional regulatory and operational cost.

4. Timeline to entry into force

We understand that it is anticipated the changes to UK Securitisation Regulation to be effected by the Smarter Regulatory Framework will enter into force from Q2 2024. Market participants will require sufficient notice of the final provisions ahead of their entry into force in order to implement necessary measures. The LMA would welcome a period of six months in this regard.

Answers to FCA Questions in the Consultation Paper

Question 1: Do you have any comments about how we have incorporated provisions of the UK SR into our rules, apart from the provisions which have been the subject of policy change as described in this paper?

Yes, please see our feedback above, notably: "General Observations" point 2.

In addition, the LMA recognises that the intention of the Smarter Regulatory Framework will require an extensive exercise in the replacement of the existing framework in the UK. The LMA recognises the numerous sources from which relevant provisions in the FCA Draft Rules and the PRA Draft Rules have been drawn, and appreciates the work of the FCA and PRA in reflecting the same in their drafts.

However, market participants may continue to rely on and refer to legacy regulatory guidance issued by both EU and UK regulators and market practices which are not currently specifically included in the Smarter Regulatory Framework[8]*.. To the extent such legacy EU and UK regulatory guidance and market practices are not inconsistent with or intended to be amended by the Smarter Regulatory Framework, the LMA would request that they are acknowledged and accepted by the FCA and the PRA, by way of a policy statement or otherwise.*

In addition to the regulatory guidance and market practices referenced above, the LMA would like to highlight that market participants have relied and continue to rely on certain provisions set out in the recitals to current retained EU law which are not currently included in the FCA Draft Rules, the PRA Draft Rules or the SI[9]*. It would be beneficial to market participants (both on the buy and sell sides) to reflect such provisions in the FCA Draft Rules or the PRA Draft Rules to enable stability and continuity for the market. To the extent such legacy recitals are not inconsistent with or intended to be amended by the Smarter Regulatory Framework, the LMA would request that they are acknowledged and accepted by the FCA and the PRA, by way of a policy statement or otherwise.*

Question 2: Do you agree with our proposed clarification of what information an institutional investor should receive to conduct its due diligence?

Yes.

Please note, the requirement to verify that information has been provided ahead of "pricing" would be of little practical importance to an investor in the secondary market. Given this, the LMA would welcome clarification that pre-pricing information would be more appropriately described as pre-commitment information such that investors are required ahead of their commitment in respect of a securitisation to receive the relevant information and materials (and not required to conduct due diligence on what has been provided prior to "pricing").

In addition, please see our feedback under "General Observations – Equivalence" above.

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[8] The LMA would be happy to provide examples of such Level 3 measures if helpful to the FCA and the PRA.

[9] The LMA would be happy to provide examples of such recitals if helpful to the FCA and the PRA.

Question 3: Do you agree with our proposed clarification of the delegation of the due diligence responsibility?

Yes, no comments on this.

Question 4: If you do not agree with our proposals on the due diligence requirements, how could we change them?

Please see our feedback under "General Observations – Equivalence" and Question 2 above.

Question 5: Do you agree with our proposed approach to risk retention for non-performing exposures (NPE)?

n/a

Question 6: Do you agree with our proposals around the insolvency of the retainer?

Yes, we welcome this flexibility however we are of the view this should be expanded.

1. *The LMA appreciates the proposed inclusion of an exception from the prohibition on transfer of a retained interest in the event of insolvency of the retainer. This exception would align with the provisions of the Commission Delegated Regulation (EU) 2023/2175 of 7 July 2023 (which comes into force on 7 November 2023)(the "**Final EU RTS**"). In addition, the LMA would welcome the inclusion by the FCA and the PRA of the additional exception that is included in the Final EU RTS. This exception applies where the retainer, for legal reasons, beyond its control and beyond the control of its shareholders, is unable to continue acting as a retainer.*

2. *Further, other circumstances may dictate when replacement of the retainer would ensure continuation of an alignment of interests between retainer and investors (for example, a corporate restructuring or reorganisation). In the EU, the concept of universal succession would assist retention holders in such circumstances and enable a surviving entity as a result of a merger to continue as an eligible retainer. Without the concept of universal succession or an express exception from the prohibition on transfer of a retained interest upon a restructuring in the UK, UK retainers will be at a disadvantage. The LMA would welcome an expansion of the rules to accommodate a transfer of the retention upon a corporate restructuring or reorganisation.*

3. *In order to promote certainty as to compliance with the retention requirements in the context of the replacement of an originator retention holder or transfer of retention in any of the manners permitted, the LMA requests that the FCA and PRA acknowledge the requirement in SECN 5.2.9R that the originator has 'established' the securitisation cannot factually be satisfied and should therefore not apply.*

Question 7: Do you agree with our proposals for the sole purpose test?

Yes, but please note the drafting in the FCA Draft Rules (at SECN 5.2.11R) and the PRA Draft Rules (at Chapter 3, Article 2(6) of the Securitisation Part) in relation to the 'sole purpose test' is similar but does not match. It would be appreciated if the two provisions could be aligned so as to avoid any unnecessary or unintentional divergence.

Question 8: Do you agree with our proposals for risk retention in resecuritisations?

n/a

Question 9: Do you agree with our proposals to exempt more firms from cash collateralisation of the retention piece?

n/a

Question 10: Do you agree with our proposals for comparability of assets on the balance sheet and 'cherry picking' in risk retention?

Yes, no comments on this.

Question 11: Is there anything else associated with our proposals on risk retention that you would like to raise?

It would be helpful in SECN 5.4.1R(1) of the FCA Draft Rules and Chapter 3, Article 10 of the Securitisation Part of the PRA Draft Rules to include the additional clarification that has been included in the Final EU RTS to avoid doubt as to the point in time at which exposures are first securitised:

a. the date of issuance of the securities;
b. the date of the signature of the credit protection agreement; or
c. the date of the agreement on a refundable purchase price discount.

In addition, given a "sponsor" of a securitisation would not be expected to have originated any of the underlying exposures, it would be appropriate to remove reference to "sponsors" in SECN 8.2.1R and SECN 8.2.3R of the FCA Draft Rules and Chapter 2, Article 9(1) of the Securitisation Part of the PRA Draft Rules.

Question 12: Do you agree with our proposals for the scope of our rules in geographically mixed scenarios?

Yes, we welcome this clarification.

Question 13: Do you agree with our proposed amendments to currency references?

Yes, no comments on this.

Question 14: Do you agree with our proposed definition of 'established in the United Kingdom'?

Yes, no comments on this.

Question 15: Do you agree with our proposals to clarify aspects of simple, transparent and standardised (STS) notifications and homogeneity?

n/a, but please see our feedback under "General Observations", point 1.

Question 16: Do you agree with our proposals for resecuritisations and credit-granting?

Yes, no comments on this.

Question 17: Are there any matters relating to transitional provisions that you would like to raise?

The LMA would welcome inclusion of explicit grandfathering provisions so as to afford market participants ongoing confidence in the compliance of existing securitisations with relevant rules without incurring unnecessary analysis or costs.

Ideally, the FCA and the PRA will include optionality in respect of any securitisations that were issued prior to the entry into force of the new rules. The LMA would appreciate the ability for market participants to designate in their discretion whether transactions should benefit from grandfathering in respect of all or part of the rules.

Question 18: Are there any other matters relating to our rules that you would like to raise?

Please see our feedback in "General Observations" above. In addition, the LMA would welcome clarification for market participants as to the requirement to deliver information that would conflict with its confidentiality duties and obligations or its duties regarding the processing of personal data. The LMA would look to receive clarification as to the ability to anonymise certain information that would otherwise be required to be provided.

Question 19: Do you agree that the definition of a public and a private securitisation should be reviewed?

The LMA understands the desire to revisit the distinction between a 'public' and a 'private' securitisation and welcomes the opportunity to discuss any proposed changes to the reporting regimes applicable to public/private securitisations, and would be very happy to participate in any such consultation and discussions. The question of classification of securitisations as 'public' or 'private' is nuanced given the variety of deals in the market, and much care will need to be taken when setting perimeters and tests. The LMA notes that in order to fully assess the impact of any change to the distinction between a 'public' and a 'private' securitisation, details as to any changes to the disclosure/reporting regime would be required. We have included below some initial views and background on this topic, but would welcome further interaction on this point in due course.

The LMA would note that CLOs and their associated warehouses are not generally 'public' securitisations in that they are typically listed on non-regulated markets (or not listed at all, in the case of certain CLO warehouses). The LMA acknowledges and agrees with the proposed policy objectives to (i) better reflect the need for standardised disclosure requirements where there is no or little ability for investors to obtain the information directly from and/or negotiate the contents of the disclosure package and (ii) provide for suitable arrangements for more bespoke securitisations.

CLO warehouses can be seen as bespoke securitisations, with a small number of investors who each have direct access to the manufacturers to negotiate reporting for the life of the warehouse. The parties will include in their contractual obligations any required reporting.

Any reporting over and above such contractual obligations would represent largely extraneous information. In the interest of efficiencies (both time and cost) and in line with the FCA's policy objectives, considering that they are, in substance, bilateral arrangements, CLO warehouses should continue to be classified as private securitisations and benefit from more proportionate reporting/disclosure obligations.

In relation to CLO transactions, although they are typically listed and admitted to trading on European MTFs, the LMA would request that the FCA and the PRA consider applying more proportionate reporting/disclosure obligations to better reflect that contractual reporting requirements are almost standardised in the market and that investors in the primary market have the opportunity to negotiate reporting and disclosure requirements.

In following the LMA's requests, we believe that the UK Securitisation Regulation would be more proportionate in terms of its treatment of CLO transactions and would assist to encourage issuance of and investment in securitisations.

Question 20: Do you agree with the approach of focusing on the definition of a public securitisation? If not, which approach would you suggest?

The approach of focusing on the definition of a public securitisation would be appropriate, provided that certain adjustments and allowances are included to take into consideration the nature of CLO transactions so as to permit a more proportionate reporting/diligence regime for such transactions. See our responses to Questions 19 to 23 (inclusive) in this regard.

In addition, the LMA would suggest that a determinative self-certification regime whereby transaction parties acknowledge and agree that a securitisation is to be treated as "private" for the purposes of the UK Securitisation Regulation should be implemented. This will provide all market participants with certainty as to what otherwise could be a nuanced classification.

Question 21: Do you agree that considering the number of investors would be problematic?

We would agree that selecting an arbitrary number of investors in order to classify securitisations as 'private' or 'public' would not be appropriate. For CLOs, it would not be possible to track the number of investors in a transaction at any time and agree with the FCA that any such approach could result in a cliff risk.

Question 22: For the definition of a public securitisation, do you agree with the concept of considering admission to trading on venues outside of the UK? What, if any, might be the unintended consequences? What principles should be used in identifying the appropriate non-UK venues for these purposes?

The LMA's view that admission to trading or listing on any venue (inside or outside of the UK) should not be dispositive as to a securitisation's status as public. There are many private securitisations that are listed on an exchange but are not actively traded or marketed. This can often include bilateral transactions which list for the purposes of the "quoted Eurobond" exception or at an investor's request. A blanket criterion that grouped all listed securitisations as "public" would have a number of unintended consequences for bilateral and smaller "club" transactions.

Question 23: Would it be desirable to connect a public announcement or general communication to the definition of a public securitisation?

Given the variety of transactions in the market, a public announcement or general communication should not be determinative as to a securitisation's status. Any such connection would need to be reviewed and nuanced with regard to the diversity of products in the market.

Question 24: Do you think the templates for public securitisations could be more proportionate?

Yes, the templates could be more proportionate in that they should reflect the information required by investors only. Much of the information currently being reported is of little value to investors. The LMA would be very happy to discuss the form of templates with the FCA if helpful. CLO investors still require the monthly reporting that has been provided to investors since the inception of the CLO market in the late 1990's. These reports include asset level information that investors have requested as the CLO market has developed. Currently UK CLO managers are producing three sets of reports: (1) the ESMA templates; (2) UK templates; and (3) the standard CLO monthly reporting package. The fact that the only reports typically accessed by investors are the standard CLO monthly reports is further evidence that the regulatory reporting under the UK and EU Securitisation Regulation is excessive and more importantly less useful for investors.

Question 25: What is the best way to balance standardisation and comparability of disclosure on the one hand against flexibility and adaptability of securitisation as a financing technique?

The use of templates is a useful technique to promote comparability of disclosure. However, given the anonymised nature of much of the reported information, reporting in the form of the current templates is limited in use. Market participants have developed "standard" CLO reporting forms which are based on investor requirements and the market is comfortable with the reports that are delivered in such form. The LMA would be very happy to discuss the form of such reports with the FCA if helpful. We would also be happy to share with you the form of monthly and quarterly reports required by the CLO investors.

Question 26: Do you think there are asset classes where reporting of individual underlying exposures is not useful and, if so, what in your view would constitute proportionate disclosure in those instances?

For CLOs, the reporting of individual underlying exposures to the extent prescribed in the existing templates is not proportionate and is not required/reviewed by investors. Generally, investors are comfortable with the market standard reporting that has developed over time which does include asset level information but not with the extensive granularity required by the existing templates. In fact, CLO investors have continued to require CLOs to report using the monthly reporting package which has been in existence since the inception of the CLO market. The current FCA templates include information that would not generally be required by/useful to investors. The LMA would be very happy to discuss the form of such reports with the FCA if helpful. We would also be happy to share with you the form of monthly and quarterly reports required by the CLO investors.

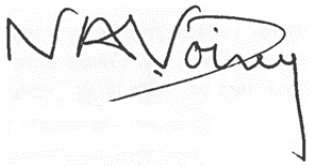
Question 27: Are there any other factors to consider in defining and reporting different types of securitisations?

Please see our feedback as to equivalence above. Given the majority of CLO transactions include reporting on the basis of the ESMA templates and investors are comfortable with the form of reports, it would be appropriate for the FCA and PRA to accept such reporting as sufficient for UK purposes.

We would welcome the opportunity to discuss this response with you and provide a further update of the market in order to highlight the ongoing positive performance of CLOs (including through the global financial crisis as well as the Covid-19 pandemic).

If you would like to do so, please contact Nicholas Voisey of the Loan Market Association (nicholas.voisey@lma.eu.com).

Yours faithfully



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