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## Skattenetværksmøde 30. januar 2020

Fagligt nyt af særlig relevans for  
investeringer og pensionsbranchen



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# AGENDA

Fagligt nyt af særlig relevans for investeringer og pensionsbranchen

- Hybrid mismatch reglerne
- DAC 6
- Global Anti-Base Erosion Proposal (GloBE) – Pillar 2

Modeller for fagligt input til netværket fremadrettet



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# HYBRID MISMATCH

## Udvalgte problemstillinger



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# OVERBLIK

Med implementeringen af Skatteundgåelsesdirektivet indføres (opretholdes) hybride mismatch, som medfører:

- Dobbelt fradrag
- **Fradrag uden medregning**
- Indirekte fradrag uden medregning

Kan opstå i relation til:

- **Hybride enheder**
- **Hybride finansielle instrumenter**
- Hybride faste driftssteder
- Hybride trusts
- Fikseret intern betaling
- Mismatch mellem skattemæssigt hjemsted
- Mismatch mellem sambeskatningskredse

Finder alene anvendelse, når det opstår mellem tilknyttede personer og mellem et skattesubjekt og en tilknyttet person....

Fortolkningsbidrag: Dansk lovtekst samt forarbejder mv., direktivet og OECD's rapporter om hybrid mismatch.



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## SÆRLIGT OM §2C (I)

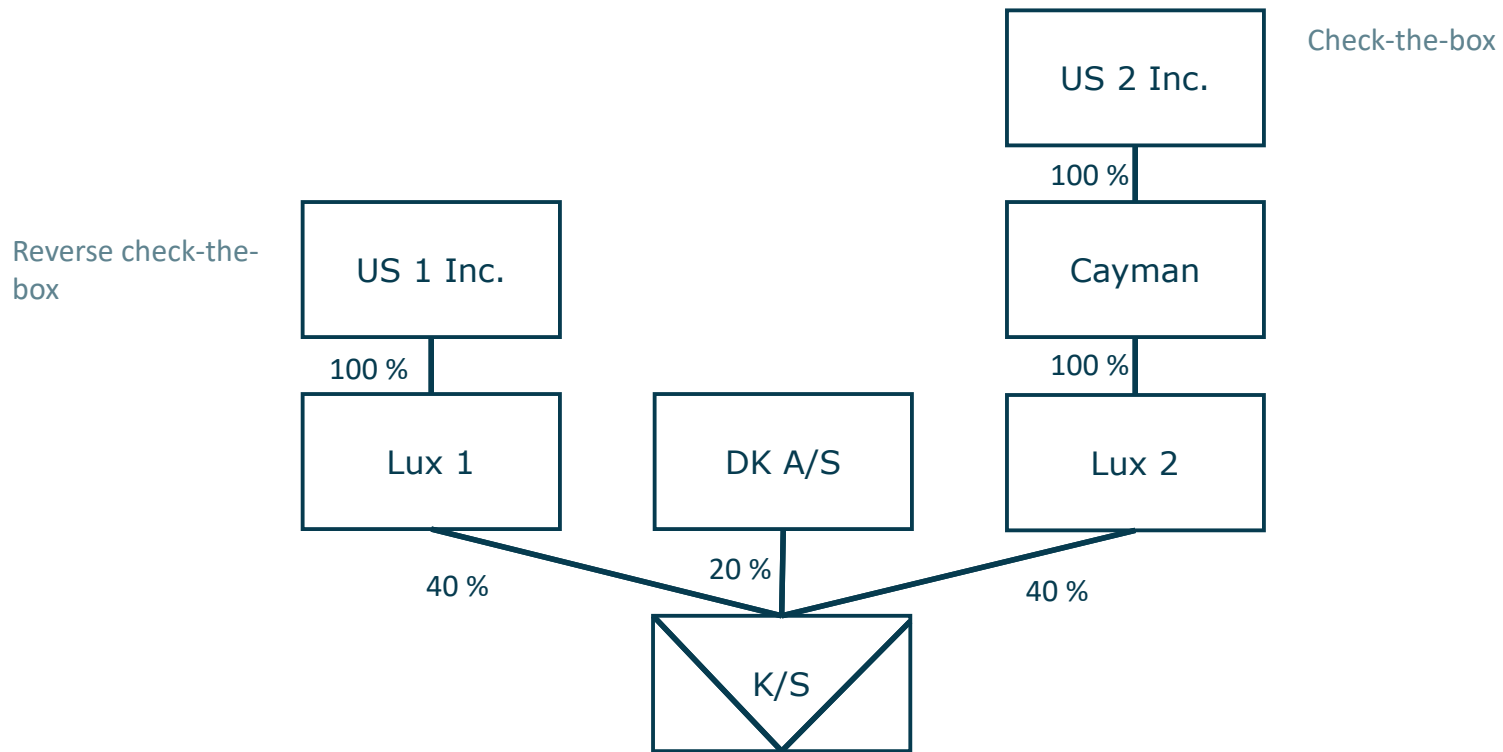
**Tilknyttede personer** der direkte eller indirekte ejer **mindst 50%** af kapital, stemmer eller retten til overskud er:

1. Hjemmehørende i en eller flere stater, hvor enheden behandles som et selvstændigt skattesubjekt,
2. Hjemmehørende i en eller flere stater, der ikke udveksler oplysninger med de danske myndigheder i henhold til en DBO mv.,
3. Direkte ejere er hjemmehørende i en eller flere stater, som ikke har en DBO med Danmark, hvorefter kildeskat på udbytte til selskaber nedsættes, og som ikke er medlem af EU

**Tilknyttede personer**; såfremt fysiske personer og/eller selvstændige skattesubjekter **agerer sammen**, anses de hver især som indehaver af alle de berørte stemmer/kapitalandele.

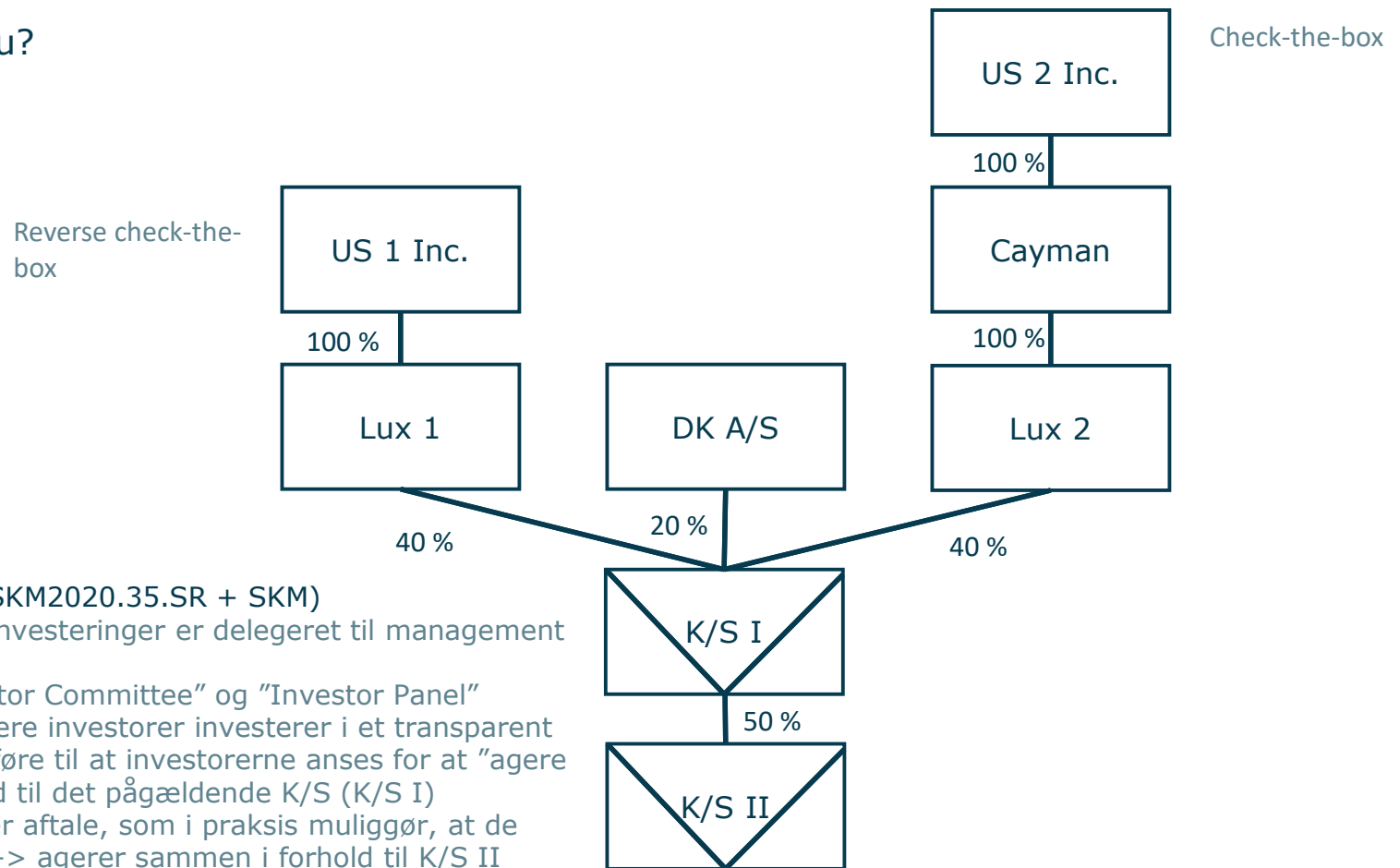
# SÆRLIGT OM §2C (II)

- Opfyldes betingelse 1, 2 eller 3?
- Opfyldes 50 % kravet – alene eller sammen med tilknyttede personer?



# SÆRLIGT OM §2C (III)

- Hvad nu?

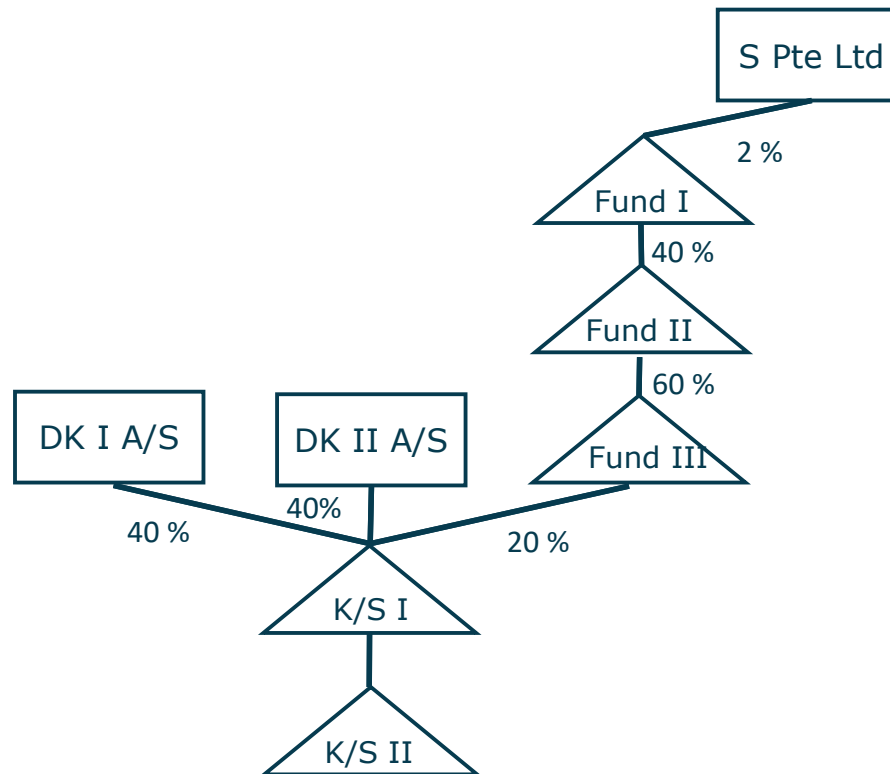


“Agerer sammen” (SKM2020.35.SR + SKM)

- Forvaltningen af investeringer er delegeret til management selskab
- Derudover “Investor Committee” og “Investor Panel”
- “Det forhold, at flere investorer investerer i et transparent selskab kan ikke føre til at investorerne anses for at “agere sammen” i forhold til det pågældende K/S (K/S I)
- “arrangement eller aftale, som i praksis muliggør, at de agerer sammen” -> agerer sammen i forhold til K/S II (stemmer og kapitalejerskab i K/S II administreres af K/S I)

# SÆRLIGT OM §2C (IV)

- Opfyldes betingelse 1, 2 eller 3?
- Opfyldes 50 % kravet – alene eller sammen med tilknyttede personer?







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# FRADRAG UDEN MEDREGNING

## Fradrag uden medregning

- Et fradrag af en betaling, hvor den pågældende betaling anses for at være foretaget (betaleres jurisdiktion), uden at den pågældende betaling på tilsvarende vis medregnes skattemæssigt i betalingsmodtagerens jurisdiktion.
- "Medregning":
  - DK: Det beløb, der bringes til beskatning i den skattepligtige indkomst i henhold til lovgivningen i betalingsmodtagerens jurisdiktion.
  - OECD: hvor en betaling indgår i beregningen af den "ordinære indkomst"
  - Direktivet: henviser ikke til "ordinær indkomst" -> betalingen må anses for medregnes selvom det er til en reduceret skattesats
- Ikke hybridt mismatch, hvis et "fradrag uden medregning" udelukkende skyldes, at modtageren generelt er skattefritaget, eller modtageren generelt er fritaget af indkomst fra udenlandske kilder.

NB! Hvis et finansielt instrumentet er "hybridt" og ville have medført "fradrag uden medregning" -> hybridt mismatch (kontrafaktuel test)



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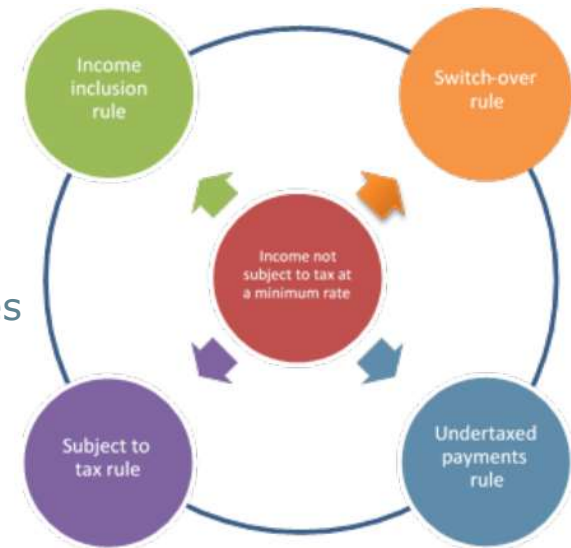
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# Global Anti-Base Erosion Proposal (GloBE) – Pillar 2

## Udvalgte problemstillinger

# Introduction

- Developing a long-term consensus-based co-ordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation.
  
- Pillar 2 – GloBE
  - Seeks to address remaining BEPS challenges by establishing a floor under CIT
    - I. Income inclusion rule
    - II. Switch-over rule
    - III. Undertaxed payments rule
    - IV. Subject to tax rule
  - Implemented in domestic law and tax treaties





## Income inclusion rule – Basic design

- Income inclusion rule
  - **Idea:** To tax the income of a foreign controlled entity if that income has been subject to ETR below a fixed min. rate
  - **Operation:** Shareholders must include a proportionate share of the income of the entity if that income has not been subject to an ETR above a minimum rate. Should operate as a top-up (simplicity and reduced cliff-edge effect)
  - **Link to existing SAARs:** Considered a supplement – and not alternative – to existing CFC rules
- Comments
  - What is the min. tax rate? (expectation: fixed 0-12.5%)
  - The “top-up approach” distinguishes the income inclusion rule from traditional CFC rules (which typically entail taxation at the regular domestic rate). Moreover, the income inclusion rules is much broader in scope.
  - Scope not yet clear
    - Only controlling shareholdings? what is “control”?



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# Switch-over rule – Basic design

- Switch-over rule
  - **Idea:** To tax the income of a foreign PE or foreign immovable property if that income has been subject to ETR below a fixed min. rate
  - **Operation:** Allow the residence state of the HQ to apply the credit method instead of the exemption method
  - **Link to existing SAARs:** Similarities with existing broad CFC regimes.
- Comments
  - What is the min. tax rate? (expectation: fixed 0-12.5%)
  - Scope not yet clear
    - Only controlling shareholdings? what is “control”?



## Undertaxed payments rule – Basic design

- Undertaxed payments rule
  - **Idea:** To allow the source state to protect itself from the risk of base eroding payments
  - **Operation:** Denial of deduction or imposing WHT on payments to related parties if the payment is not subject to tax at a min. rate in the recipient's country
  - **Link to existing SAARs:** Hybrid mismatch rules, WHT rules (beneficial ownership)
- Comments
  - Scope not yet clear
    - Only controlling shareholdings? what is "control"? which payments are within the scope?
  - What is the min. tax rate? What if recipient is loss making?
  - What if ETR is unknown at the time of payment?



## Subject to tax rule – Basic design

- Subject to tax rule
  - **Idea:** To allow the source state to protect itself from the risk of base eroding payments (like the “undertaxed payments rule”)
  - **Operation:** Certain treaty benefits only granted if the payment is subject to tax at a min. rate in the recipient's jurisdiction
  - **Link to existing SAARs:** Subject to tax rules in MLI and OECD Model 2017
- Comments
  - Scope not yet clear
    - Only controlling shareholdings? what is “control”? which payments are within the scope?
  - What is the min. tax rate? What if recipient is loss making?
  - What if ETR is unknown at the time of payment?



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# Technical issues

- Tax base determination
  - In principle: Determine by CFC rules or CIT rules of shareholder
    - Each sub need to recalculate its income each year
    - Differences in calculation of tax base could impact ETR
      - Timing differences and the recognition of income and expenses
  - Alternative approach: Determine by financial accounting and adjust to align accounting income to a measure of taxable income
    - How to adjust for temporary differences?
- Blending income which is taxed differently
  - Worldwide blending
  - Jurisdictional blending
  - Entity blending





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# Technical issues

- **Carve-outs:**
  - Compliance with BEPS Action 5 and other substance-based regimes
  - Return on tangible assets
  - Specific sectors or industries
- **Thresholds:**
  - Turnover or other indications of the size of the group
  - De minimis thresholds on profit or related party transactions



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## Concerns

- Broad scope – beyond BEPS
- Should the effects of the BEPS project be awaited?
- Simplification measure to reduce burdens through screening.
- Compatible with tax treaties as well as primary and secondary EU law?
- Co-ordination rule between the rules and between jurisdictions is needed
- NOL in tax base determination
- ETR as useful measure – inclusion of deferred tax.
- Interaction with pillar I
- Clear guidance and uniform interpretation is important
- Mandatory effective dispute resolution mechanism is necessary



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# FAGLIGT INPUT

## Fremadrettet

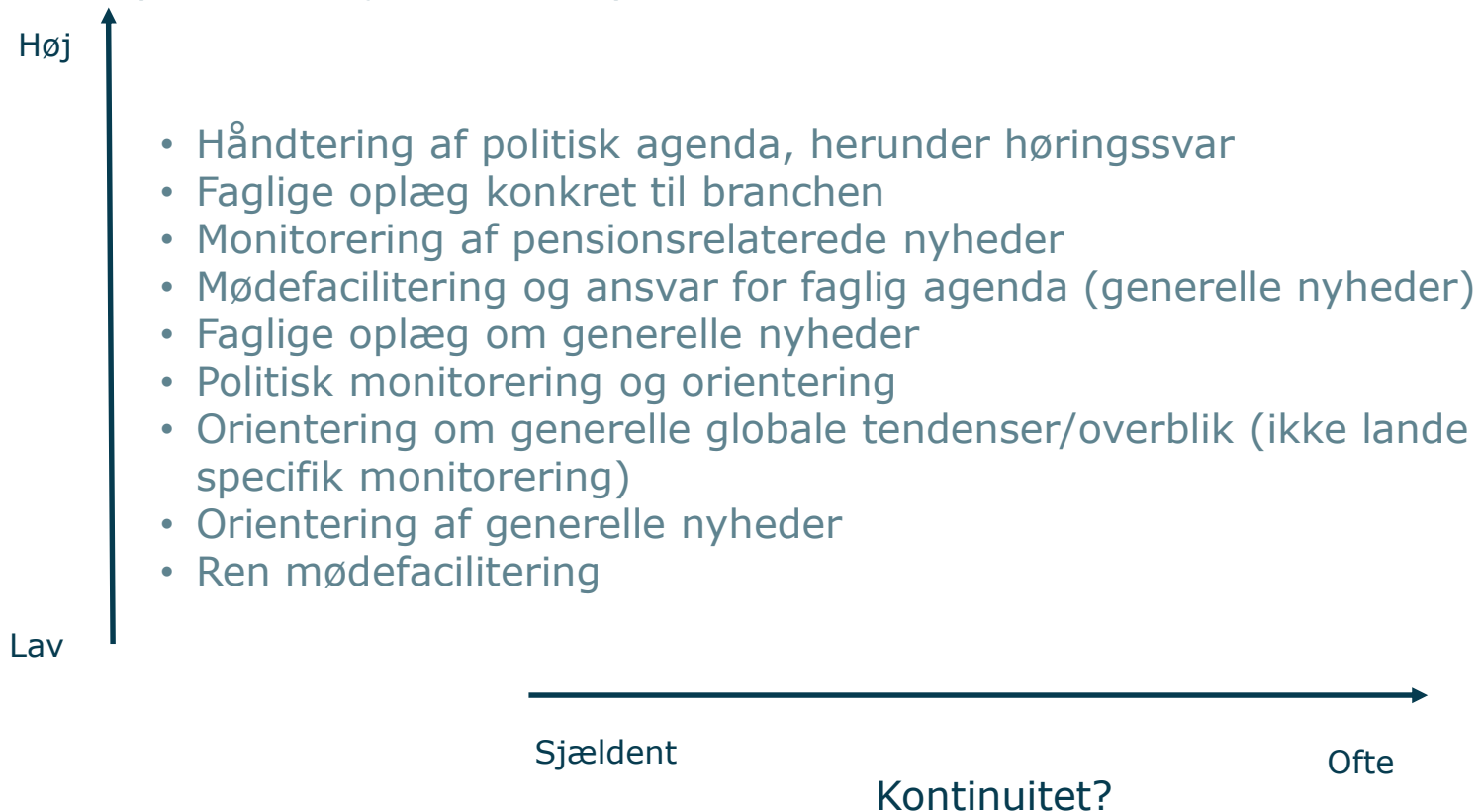


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