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On the Problem of Dispositive Norms of Private and Public Law of Modern Russia

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Abstract: It seems that dispositiveness in law is expressed not only in the methods, methods and types of legal regulation, but also in the relevant norms that objectively determine the independence and autonomy of the subjects of the realization of the law. Aims of the study: the purpose of the scientific article is the substantiation of the existence and functioning of dispositive norms of law not only in the private law branches, as many theoreticians believe, but also in public. To achieve this goal, the following tasks are set: to reveal the concept of disposability and to determine its relationship with the dispositive norms of law; group the positions of the authors from the point of view of their evaluation of dispositive norms: 1) scientists who show negative attitude towards dispositive norms; 2) authors who recognize dispositive norms, however, while focusing only on private law; 3) theorists who recognize the existence of dispositive legal norms, both in private and in public law, while emphasizing its more reasoned; analyze the features of dispositive norms, which in private law are of dominant importance; to show specificity of dispositive norms of law in various branches of public law (criminal procedural, criminal, tax);taking into account the effect of dispositive norms, both in private and in public law, clarify the concept of "dispositive norm", which is associated with valuation concepts, the content of which is disclosed in the process of exercising the law; to analyze appraisal concepts, which necessarily lead to dispositive norms; to show the interaction of dispositive norms of private and public law. As a result of the conducted research it can be concluded that dispositive norms exist and function not only in private but also in public law; their presence is largely determined by the so-called valuation concepts, which, in turn, determine the legal activity of both citizens and officials of the relevant state bodies. In the conclusion it should be noted that dispositive regulations of both private, and public law, are in interaction with the relevant peremptory norms, anyway, correspond to them.

Keywords: Optionality, Private Law, Public Law, Democratization of Law, Discretion, Evaluation Concepts

1. Introduction

It is believed that the democratization of modern Russian law necessarily necessitates such a property as disposition.

One of the reasons for the imperfection of the legislation, in particular in the sphere of the economy, in the early 1990s was the lack of development of such legal institution as disposability [1]. It is no coincidence that the formation of market relations in Russia began with the requirement of economic independence of the subjects of law, which in the legal sense meant the rejection of imperativeness, although not completely, in the economic sphere, a change in the correlation of legal regulation methods in favor of disposability. As Vladimir Alexandrovich Tumanov noted at the time with the administrative-command system of management, law is recognized insofar as it is understood as a mandatory order for execution. The right, in connection with the abolition of the command system of management, does not abolish the relationship between the subject and the object of management, but restricts the administrative power and allows the subject to act in his relations as a legal addressee, and not an impersonal addressee of the law [2].

Firstly, dispositiveness in law finds its real manifestation not only in methods and types of legal regulation, but also in the relevant norms of law, principles and other legal instruments; secondly, this property of law objectively assumes relative independence, autonomy, self-activity of subjects of the law-realization, including law enforcement.

The term "dispositivity" is Primary here, and its derivatives are "dispositive regulations", "a dispositive method of legal regulation", "the principle of dispositivity", etc. The term "dispositive" (from late Latin "dispositivus"-disposing, seeing) literally means "the allowing choice". Dispositivity is the most general concept of the general legal theory; it is the legal freedom (opportunity) based on rules of law to perform the subjective rights (to purchase, implement or dispose of them) at discretion. In jurisprudence it is noticed that"... in modern Russian society there are basic humanitarian beginnings - finding by the person of quality of the independent personality with socially caused need of ensuring her freedom and an initiative. Therefore, there is implementation of the normative beginnings corresponding to the specified values..."[3].

The concept of dispositivity is wider than the concept of dispositive rules of law. The last are the form, mean, method of expression and development of dispositivity in the right [4].

2. Method

In the preparation of a scientific article, the following methods were used:

2.1. General Philosophical Method

general philosophical (dialectical-materialistic) which applies to all social sciences;

2.1.1. General Scientific Method

general scientific (analysis, synthesis, abstraction, historical and legal, comparison, etc.) which are used not only by the theory of law, but also by other sciences;

2.1.2. Special Method

special methods (mathematical, linguistic, specifically sociological, etc.) which are developed by separate special sciences and are widely used to study legal phenomena;

2.1.3. Private-Scientific Method

private-scientific (formal legal, methods of interpretation, etc.) which are developed by the theory of law and used within the law.

2.2. Evaluation of Discretionary Norms of Law

The analysis of legal literature allowed drawing a conclusion that assessment of dispositive rules of law from scientists the most different. In our opinion, positions of authors can be grouped as follows.

The first group is made by the scientists who have negative attitude to dispositive regulations, such regulations are ignored and not mentioned at all. Igor Valeryevich Tabarin's position can be an example which the author reasons with the following arguments.

First, the phrase mentioned in the legislation "if other is not established by the agreement" designates the action of the rule of law in period (a part of a hypothesis), but is not a special type of regulation.

Secondly, as Igor Valeryevich Tabarin writes, the division of rules of law depending on the degree of the obligation of their accomplishment contradicts the main postulates of the modern legal theory and a concept of a phenomenon of the right. The scientist in a categorical form claims that "... all regulations are equally obligatory for accomplishment by the obliged subjects and not just imperative... There cannot be initially more obligatory or less obligatory regulations... However no versions from degree of obligation of accomplishment of precept of law can exist"[5].

It is thought that the provided position is far from legal reality, and its author does not notice that all rules of law have a binding character, but, on the contrary, degree of their obligation can be the most different. In this regard it is necessary to agree with Mikhail Iosifovich Baytin's and Dmitry Evgenyevich Petrov's opinions who pay attention to that circumstance that it is necessary to distinguish a concept of peremptory norm and imperativeness of the right. In imperativeness in combination with all-obligation the state and strong-willed character of the right as sign, property of any precept of law is shown irrespective of what type it treats on the basis of this or that classification criterion. In this sense, the authors mean that any rule of law is the command proceeding from the state and, therefore, has a certain imperativeness. But extent of manifestation of imperativeness at different types of rules of law is not identical. In the characteristic and functioning of one regulations, in particular imperative, it has the defining value, acts on the foreground. In the characteristic and action of other types of regulations, in particular dispositive, the imperativeness is not so convex, and sometimes in general is imperceptible [6].

The second group of scientists recognize dispositive rules of law, as other rules of law, however, only by private law. So dispositive regulations are characterized as the rules of conduct having contractual character. There is a lot of examples of such interpretation of dispositive regulations in different variations. Vladik Sumbatovich Nersesyants wrote that dispositive regulation is such regulation which is applied as the agreement of the parties did not establish other. The author believed that the parties can exclude application of such regulation in the agreement or establish a condition, that isn't there [7]. Alexander Nikolayevich Chashchin claims that "dispositive regulations are rules of law which allow legal contractual (it is allocated by us - V. K.) derogation from the rules of conduct which are contained in them"[8].

2.3. Dispositive Rules of Private Law

Some authors, unreasonably identifying authorizing and dispositive rules of law [9] , concerning the last they make emphasis on the private-law character. So, Valery Vasilyevich Lazarev believes that authorizing regulations most often belong to the category of the dispositive, i.e. allowing behavior of the addressee regulations under the agreement with the partner [10]. Vasily Ivanovich Vlasov and Galina Borisovna Vlasova, characterizing dispositive regulations,

pay attention that, first, they give to the parties of the regulated relation an opportunity to define the rights and duties in some cases; secondly, they are from the private law that area of the right where regulation is performed by legal entities [11]. The similar position on the considered problem is available for Ivan Andreevich Ivannikov considering that such regulations work only where subjects did not establish by the agreement other conditions of the behavior meet those lacks on which there is no arrangement between the parties [11]. Some authors accompany general-theoretical regulations on dispositive regulations of private law with specific examples. So, according to Elena Andreyevna Kirimova, such regulation contains in Art. 409 of the Civil Code of the Russian Federation in which it is specified: "By agreement of the parties the obligation can be stopped by providing instead of execution of a compensation (payment of money, cession of property, etc.). The size, terms and an order of providing a compensation are established by the parties"; in Art. 120 of the Civil Procedure Code of the Russian Federation: "The parties can under the agreement among themselves change territorial cognizance for this case"[13].

Estimating the specified position dialectically, it should be noted that really in the industries of private law dispositive regulations have the dominating value. Scientists pointed to this circumstance repeatedly as in the past, and the present. The private law is literally penetrated by the ideas of freedom, independence of individuals which are so necessary for truly democratic society; the regulations it orients to manifestation of a due activity rate.

2.4. The Priority of Private Law in Relation to Public Law

In pre-revolutionary Russia the ideas of freedom in civil law were developed by the famous theorist and the historian of private law Joseph Alexeevich Pokrovsky who wrote: "The civil law from time immemorial and on the structure was the right of the certain human person, the sphere of his freedom and self-determination". According to him, "the idea of the personality as about something legally independent and independent even in relation to the state, his authorities for the first time arose here". The scientist emphasized that the civil law owing to the development objectively demanded "release of the personality from any fetters connecting him, demanded freedom of property, freedom of agreements, freedom of wills, etc." as "economic progress is possible only under a condition of recognition of freedom of an economic initiative and amateur performance"[14]. As the soviet lawyer Mikhail Mikhailovich Agarkov wrote, civil law - "the area of freedom and private initiative", and "the private law is the personal and free right. And the subject can perform it in any direction"[15].

Moreover, it is necessary to consider that "... many spheres of legal regulation lose their public character or considerably weaken it due to strengthening of the private-law beginnings, can be an example of what land legal relations"[16]. There are similar to this provision statements that "... the Russian system of positive law is nowadays enriched with natural and legal values and turns into the powerful regulator and a guarding factor approving civilization values. A reference point for its development is the person, his rights and freedoms. Therefore on a number of the directions the unconditional priority of private law which pushed aside public law is noticeable and even gets into it"[17].

2.5. On the Recognition of the Dispositive Rules in Both Private and Public Law

However, despite these fair notes, the analysis of dispositive rules of law oriented only to the field of private law is defective. Therefore the position of the third group of authors who recognize availability and functioning of dispositive regulations, both in private, and in public law is more reasoned. And recognizing availability of such rules of law in public law, quite reasonably to claim that at their treatment use of such terms as "agreement", "parties", etc. is inappropriate.

The authors of this group differently express the point of view. So, Mikhail Iosifovich Baytin, Dmitry Evgenyevich Petrov believe that dispositive regulations are inherent to many areas of Russian law, however most they are inherent in civil law as the specific method of legal regulation of this area is based on equality and autonomous provision of subjects [18]. As Ivan Sergeevich Lapshin notes, the coverage of dispositive legal regulations concerns the majority of areas of the operating both private, and public Russian law [19]. Mizamir Ahmedbekovich Aliekserov believs that "at any branch of law there are both imperative, and dispositive elements of legal regulation. At the same time the total characteristic of the method of the legal area can be based on the most typical for it, the means and methods of impact on legal relationship in priority used"[20].

If to speak in general about dispositive regulations of public law, it is necessary to emphasize that the vector of legal development of Russia connected with liberalization and considerable complication of social practice objectively caused relevance of the decentralized legal regulation and in the areas of the public law designed to serve, on the one hand, as the mechanism of ensuring definiteness of the principles and rules of law, and with another, to give big flexibility to the modern right. We will note also that circumstance that the modern system of the right considerably expanded the normative bases of initiative of legal entities. In the context of problems of dispositive regulations it is possible to allocate normative caused initiative not only private subjects of which it was talked above, but also an initiative of public subjects which in the Soviet jurisprudence was offered to be considered as addition of the principle of dispositivity [21].

Yuri Aleksandrovich Tikhomirov recognizes availability of dispositive regulations in public law and, on the contrary, peremptory norms in private law and allocates two main methods: dispositive as patrimonial, specific to the industries of private law, and imperative as specific to the area of public law. He claims that each of the main methods is patrimonial and is expressed in different methods of more specific

character. The author writes about what would be incorrect, distinguishing basic methods, not to see their interrelations and some kind of contiguity [22]. We will notice that earlier the scientist pays attention to that circumstance that "methods not separately one from others, and in the combination are applied, in a complex, because otherwise it is not possible to provide efficiency of legal influence" [23].

Sergey Petrovich. Mavrin's point of view who pays attention that in the field of specific industries of positive law which the labor right concerns, for example, impracticablly to draw an accurate distinction between on a centralized basis - normative and decentralizovanno-contractual regulation is close to this position [24]. It, according to the author, is explained by the fact that among sources of a labor law there is rather large number of the legal acts combining signs both normative legal, and the contractual sources of the right both centralized, and decentralized [25]. Valentin Dmytrovych Sorokin in general puts forward the idea of existence of a uniform method of legal regulation as the system phenomenon which is shown by means of three main, primary methods of impact on the behavior of the people who are closely interacting among themselves and fixed in rules of law. The author writes that" one kind of precepts of law... defines borders and content of possible behavior of legal entities and subjects of legal relationship. Dispositions of these regulations contain different, very various modifications of the permission"; "the other group of provisions fixes, prescribes due active behavior of subjects from which they, at approach of the situations provided by regulation, have no right to evade. Dispositions of these regulations contain the instructions containing numerous nuances"; "the third kind of precepts of law influences behavior of people by means of prohibitions of certain acts, diverse on the shades (action and failure to act). Contains in a disposition of these regulations... the prohibition which is (as well as the permission, and the instruction) an initial component of a method of legal regulation "[26].

If to speak about scientific works devoted to dispositive regulations of public law, so unfortunately, it should be noted that there aren't many. It is thought that to some extent it is caused by that circumstance that dispositivity often is not considered in the analysis of the principles, say, of criminal legal proceedings by some scientists of the procedural law [27]. Zinaida Vitalyevna Makarova directly says that dispositivity (the right of participants of criminal legal proceedings to act at discretion) cann't be the principle of criminal trial as in the cases of crimes are investigated, considered and permitted - is guilty perfect socially dangerous acts, i.e. the acts dangerous to all society though they can be directed also against the specific person. Therefore, it is summarized by the author, to consider excitement and course of production depending on desire of one person inadmissibly [28].

At the same time, many authors, considering different problems of the criminal procedure right, specify in the works on action of the principle of dispositivity [29]. Alexey Sergeevich Alexandrov, believing that justification of all-procedural value of the principle of dispositivity in criminal legal proceedings is the method of theoretical justification of legal freedom and equality of the parties in criminal trial, emphasizing that dispositivity defines a method of development of competitive process, marks out material and formal dispositivity. Under the first the scientist means the freedom of the parties to dispose of the rights both for the criminal claim (to bring charge, to involve in criminal prosecution or not) and for never mind it. Speaking about formal dispositivity, the author pays attention that the parties are free both in the choice, and in application of procedural means for justification of the requirements to court: from the parties it has to depend, to excite or not initiate the petition, appeal against these or those investigative actions, to provide, to investigate in court this or that proof, etc. Formulating the principle of dispositivity as freedom of the parties provided by the law in certain limits to dispose of the rights to the criminal claim and objection against him and also other procedural laws, including the right on proof, in the procedural interests, the author specifies that subjects of dispositivity are the party of charge and the party of protection, as well as the state prosecutor [30].

According to Ilya Stepanovich Dikarev, dispositivity is the principle of criminal legal proceedings and its participants and also other interested persons have an opportunity to dispose of a subject of criminal trial (charge) or the disputable substantive right by production according to the civil suit in criminal case and also to dispose for the purpose of protection of upheld interests of procedural laws which implementation exerts considerable impact on production on criminal case.

Dispositivity is also differentiated by the author as two types: material and procedural. Material dispositivity is expressed in a possibility of the order by a subject of criminal trial (charge) and also the disputable substantive right by production according to the civil suit in criminal case. Action of procedural dispositivity in criminal legal proceedings is connected with providing criminal legal proceedings to participants and other interested persons for protection of the personal, protected or represented interests upheld by them of procedural laws which implementation is not connected with the order a subject of criminal trial, but exerts considerable impact on production on criminal case [31].

Aisha Ansarovna Gadzhiyeva, considering dispositive regulations in relation to criminal law, notes that the first mediate autonomy of subjects of criminal legal relations; the basic in their characteristic - this or that degree of freedom of declaration of will of the subject. Noting that dispositive regulations contain both in the General part of criminal law, and in the Special part (the p. 2 of Art. 12, Art. 76, a comment 2 to Art. 201), paying attention that the following formulations can indicate the dispositive nature of regulations: "the person can be released", "the serviceman (minor) can be released", "the court can delay", etc., the scientist formulates as follows dispositive regulation of criminal law: "it is the measure of possible good behavior of subjects of criminal legal relationship provided in the penal

statute at alternative use of the rights granted to them and also application of instructions of precepts of law in specific vital cases"[32]. Elena Nikolaevna Polishchuk, investigating dispositive regulations of criminal law of Ukraine, believing that the private beginnings in this branch of law are connected with the central figure of the victim as participant of the criminal and legal conflict and also third parties who the declaration of will influence his decision a little differently treats dispositive criminal regulation: it is regulation of the penal statute which provides to formally equal, personable parties of the criminal and legal conflict and also an opportunity it is lawful to third parties to establish the mutual rights and duties or to choose an optimal variant of behavior from alternatively offered [33].

In relation to a tax law, Aleksandr Vasilevich Dyomin writes the detailed normative regulation and minimization of freedom of subjects on independent regulation of the behavior within tax legal relationship are inherent to the public area, dispositive means here are used by the legislator extremely circumspectly and is specific. The author notices that as contractual forms are not inherent to a tax law, dispositivity has other expression here: first of all, it contacts a possibility of the personal choice by the interested subject of the most convenient, optimum, according to him, option of legally significant behavior (certainly, strictly, on the basis and within the law); and such choice is, as a rule, made not by the conclusion of agreements with the partner, and as a result of the unilateral strong-willed decision. As the illustration of dispositive regulations there is the third of p.1 of Art. 83 of the Tax code of the Russian Federation which logically proves the following rule is provided the paragraph: "The accounting of the largest taxpayers is carried out generally an order if other order is not established by the Ministry of Finance of the Russian Federation". It is necessary to pay attention to that provision according to which dispositive manifestations in a tax law can cover as imperious subjects (territorial educations, the state and municipal bodies, officials), and individuals. For example, the imperious subject was given an opportunity to recede from the general behavior model established by the law he is free to solve independently, to implement to him this opportunity or not. So, owing to item 4 of Art. 69 of the Tax Code of the Russian Federation aggregate term of execution of the requirement about payment of a tax makes 10 days, however the tax authority has the right to establish at discretion more long time frame for payment of a tax; but he can "keep silent", having left the aggregate 10-day term provided by the provision of the law for execution of the requirement. Both the decision is lawful, and does not demand any additional motivation. In the field of tax process the dispositive beginnings are shown when further development of this or that procedure depends on declaration of will of the interested person. In particular, the applicant, proceeding from own interests and opportunities, solves, to appeal to him or not the act of tax authority (item 1 of Art. 139 of the Tax Code of the Russian Federation), what documents to attach in justification of the position (the paragraph the first item 2 of Art. 139), to declare or not recovery of the passed term on submission of the complaint (the paragraph the second item 2 of Art. 139) and as a result to withdraw or not already subject in higher tax authority or to the higher official the complaint before adoption of the decision on her (item 4 of Art. 139 of the Tax Code of the Russian Federation) [34].

Meaning the action of dispositive regulations both in private, and in public law, more preferable, in our opinion, the point of view concerning understanding of the first of Oleg Ernestovich Leyst writing that dispositivity is designated as the right (opportunity) to arrive differently is than it is specified by regulation as determination only the purpose which has to be reached by use of "estimated concepts" which maintenance reveals in implementation process of the right [35]. Estimated concepts have two parties: objective and subjective. The valid properties of this or that phenomenon, concept which the subject uses are their cornerstone. The subjective party is expressed that in the course of application of estimated instructions the subject puts in them the sense meeting his personal expectations of properties of any phenomenon.

2.6. Evaluation Concepts and Dispositive Rules of Law

It must be kept in mind that, along with the signs inherent in all concepts and terms, estimated concepts and terms have a number of the specific differences allowing to distinguish them in a separate class.

So, Jakov Markovic Braynin called the estimated concepts which are not concretized by the legislator and specified when applying the law [36]. Vladimir Nikolaevich Kudryavtsev noted that such concepts, using "the subject performs two functions must be carried to number of estimated: he not only compares the considered concept to the general concept, but also formulates, defines the maintenance of the most this general concept of the known limits»[37]. In the subsequent the scientist specified, saying that "the maintenance of estimated concepts considerably is defined by sense of justice of the lawyer applying the law … taking into account circumstances of specific case"[38].

Mikhail Ivanovich Baru marks out the following features of estimated concepts: not specified by the legislator or other competent authority; specified in the course of law enforcement; give to law enforcing body the chance of a free discretion, free assessment of the facts [39].

Interest on the discussed problem is attracted by a position of Tatiana Vasilyevna Kashanina defining an estimated concept as the provision (instruction) expressed in rules of law in which the most general signs, properties, qualities, communications and the relations of various objects, phenomena, actions, processes are fixed which is in details not explained by the legislator it was concretized by assessment in the course of application of the right and allowed to perform within the community recorded in him an individual subnormative regulation of the public relations [40].

Viktor Vasilyevich Ignatenko means by estimated concepts

"the typical signs of certain right significant phenomena which are in details not explained by the legislator and generalizing in themselves … which specification is performed by assessment within a specific law-enforcement situation"[41].

It is seems that the author enough reasonably noticed that the maintenance of estimated concepts can be established only in the course of use of rules of law in which they are included, taking into account all facts of the case. Concrete facts and a situation in which they take place give criteria for understanding of an estimated concept, for refining of his contents.

Really, if to analyze, for example, articles Codes of Criminal Procedure of the Russian Federation, the contained dispositive regulations and regulating production of investigative actions, then it is possible to pay attention to such estimated concepts as "in the presence of good causes (data) to believe" (the p. 2 of Art. 140, the p. 2 of Art. 153, the p. 1 of Art. 171), "in case of need" (the p. 9 of Art. 166, ch4 Art. 223), "at a discretion (own initiative)" (the p. 4 of Art. 189, the p. 3 of Art. 192), "in exceptional cases" (the p. 1 of Art. 152, the p. 5 of Art. 165, the p. 5 of Art. 223), "in cases, being urgent" (the p. 3 of Art. 164, the p. 2 of Art. 176, the p. 11 of Art. 179), etc. The regulations containing estimated concepts take place and in other industries, both private, and public law [42]. The first as it is represented, in turn, with need cause the discretion of citizens and officials, their legal activity [43].

It seems that the problems of the legal activity of the individual, the discretion of the subjects of application of the law, the dispositional norms of public law are very important and at the same time promising general theoretical problems [44].

3. Result

As a result of the conducted research it can be concluded that dispositive norms exist and function not only in private but also in public law; their presence is largely determined by the so-called valuation concepts, which, in turn, determine the legal activity of both citizens and officials of the relevant state bodies.

4. Discussion

Analysis of legal literature revealed a number of controversial issues relating to the topic of a scientific article. Their essence boils down to the following provisions: a negative or positive attitude towards dispositive norms; recognizing discretionary norms of law, should one focus only on private law; in which branches of public law and how are dispositive legal norms.

5. Conclusions

In the conclusion it should be noted that dispositive regulations of both private, and public law, are in interaction with the relevant peremptory norms, anyway, correspond to them.

In this regard, it is important to emphasize that now the new system must be on the basic equality of private-law and public approaches on the interaction, but not subordination of private law to public it has to take the place of "pyramid" of the coordinated industries. At the heart of this approach, the author writes, the constitutional recognition of the supreme value of the rights and freedoms of the certain person, i.e. a priority of private, but not public interests lies. At the same time should be noted that it does not belittle in any way the highest legal force of the Constitution and the majority of other sources of constitutional right because it is not necessary to mix the Constitution as the law taking the main place in the system of the legislation and constitutional right which as a component of public law cannot take priority over the industries of private law.

It seems important to note that arguing on the so-called contractual freedom representing implementation of methods of self-regulation of rules of conduct of legally equal participants of civil circulation and identifying it with the subjective right, we believe that it gives an opportunity to do everything that does not do harm to other agreement party, bases of law and order and morality or public interests in general. The last, as we know, are provided with regulations not only public law, but also, considerably, private law, in the absolute majority consisting from positive, the permissive instructions. However, it is necessary to emphasize that unified bases of life in society are established by the state which cann't give to certain individuals a vent to be contrary to his installations for the purpose of satisfaction of their private benefits and to destroy the bases determined by the state. Therefore the question of rationality of limits of action of contractual freedom is essential. It also causes availability in this beginning of some public characteristics in the form of certain restrictions.

6. Recommendations

When formulating the dispositive rules, one should take into account that they are fixed and implemented both in the sphere of private and public Russian law.

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