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**Amended proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
amending Directive 91/440/EEC
on the development of the Community's railways**

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1. On 22nd July 1998 the Commission adopted a proposal¹ for a Council directive amending Directive 91/440/EEC on the development of the Community's railways². On 20th October 1998 the Commission submitted this proposal to the Council (SYN 98/0265). The purpose of the proposal was to clarify the separation of accounts between infrastructure management and transport services, to introduce the separation of accounts between passenger and freight transport services, and to ensure that a regulatory function that determines access to railway infrastructure is carried out by bodies or undertakings that do not provide rail transport services themselves. The proposal also clarified the role of the State in providing railway infrastructure.
2. At its plenary session of 10th March 1999, the European Parliament approved the proposal subject to amendments. After the entry into force of the Amsterdam Treaty on 1st May 1999, the Parliament had to re-approve its first reading. The European Parliament finally approved the Commission's proposal at its plenary session on 15th September 1999, subject to ten amendments. The Commission accepts the following amendments to its proposal:
 - the introduction of a new recital 3a, now numbered 4 (amendment 1)
 - the introduction of a new recital 3b, now numbered 5 (amendment 2)
 - the amendment of Article 1.1, referring to Article 1, second and fourth indent of Directive 91/440/EEC (amendment 4)
 - the amendment of Article 1.2 referring to Article 3, second indent, of Directive 91/440/EEC (amendment 5)
 - the introduction of new Articles 1.2a and 1.3a (amendments 6 and 7), these are grouped under a new Article 1.3 referring to Article 6 of Directive 91/440/EEC
 - the introduction of new Articles 1.4a and 1.4b (amendments 8 and 9); there are grouped under a new Article 1.4, referring to Article 7 of Directive 91/440/EEC
 - the introduction of a new Article 1.5a, newly numbered 1.6, referring to Article 10 of Directive 91/440/EEC (amendment 10)
3. The first major change proposed by the Parliament concerns Article 6, paragraph 1, of Directive 91/440. Amendment 6 would require the creation of entities separate from railway undertakings for infrastructure management after a short transitional period. This is a further step in separation, beyond that originally considered strictly necessary by the Commission to achieve the aims of fair and non-discriminatory access to infrastructure, efficient operation and development

¹ COM(98) 480 final 22.07.1998

² Council Directive 91/440/EEC of 29 July 1991; O.J. L237, 24.08.1991, p.25

of two distinct activities, transparency of railway finances and public support, and creation of a solid basis for setting infrastructure charges. Complete separation of transport services and infrastructure management into distinct entities would further advance the achievement of these objectives. The Commission therefore accepts this amendment but modifies the wording proposed by the Parliament to specify that each entity must have its own legal personality and places the new text in the section dealing with separation.

4. Amendment 7, concerning Article 6, paragraph 2, covers the transitional period. It would oblige Member States to organise distinct divisions within a single undertaking for transport services and for infrastructure management until the separation into different entities according to Article 6, paragraph 1, takes place. This the Commission accepts but proposes to place the respective text into Article 6, paragraph 1.
5. Acceptance of this further step in separation of transport services and infrastructure management obliges the Commission to make three other changes to its proposal for the sake of consistency. First, it replaces Recital 2 of the proposed directive with a new text to reflect the new Article 6, paragraph 1 and adds a new Recital 3 to take account of the new Article 6, paragraph, 2. Second, it proposes a new text for the second indent of Article 1 of Directive 91/440/EEC to reflect Articles 6, paragraph 1, and 6, paragraph 2, and a new third indent that partially replaces the second indent. In this third indent it takes the opportunity to clarify that functions determinant for access to infrastructure should be exercised by independent bodies, in the sense of independence from railway undertakings. Third, it deletes Article 7, paragraph 2, so as to make it clear that a railway undertaking cannot manage infrastructure when there is separation into different entities.
6. The second major change proposed by the Parliament, to Article 10 of Directive 91/440/EEC, would open access to railway infrastructure for international freight services (amendment 10). Like the Parliament, the Commission is convinced that market opening is essential to revitalise rail freight and should be undertaken in steps. It would attract new operators, bringing new ideas, fresh management and additional capital, and stimulate existing operators to improve their performance. In 1995, it proposed the creation of access rights for supplying all freight and for international passenger services³ and in 1998 launched the idea of opening the freight market by stages⁴.

The Commission fully accepts, however, that priority should be given to establishing access rights for international freight services. The existing arrangements, under which railway undertakings are only responsible for that part of the service on their own territory, do not allow the development of seamless international services or give incentives to lower the cost and improve the quality

³ Communication from the Commission on the development of the Community's railways, COM(95) 337 final 19.7.1995

⁴ Communicaton from the Commission on the implementation and impact of Directive 91/440/EEC on the development of the Community's railways and on access rights for rail freight, COM(98) 202 final 31.3.1998

of service. The Commission supports the Parliament's intentions. Following the Parliament's view that the opening of the rail market should be undertaken in stages, it however proposes as a first step to give access to international freight services on a defined European network, called the Trans European Rail Freight Network. The new Art 10a defines its elements.

The Commission nevertheless wants to stress that a complete opening of the market for rail transport services for both passenger and freight is important. It will therefore pursue this issue further and continues to see full liberalisation as its final goal. In view of this it is important to monitor developments and this is why the Commission proposes to replace Article 14 of the Directive in vigour, which is outdated. According to the new wording of this Article, the Commission will, two years after the date by which Member States have to comply with the Directive, report and make adequate proposals.

7. In order to allow for the evolution of the Directive in general, and in particular of the Trans European Rail Freight Network, the Commission shall be assisted by a Regulatory Committee as provided for in Article 5 of Council Decision 1999/468/EC of 28 June 19995 laying down the procedures for the exercise of implementing powers conferred on the Commission.

The advisory committee already foreseen in article 11 of Directive 91/440/EEC in vigour shall nevertheless be maintained and the reference to the procedure will therefore be adapted to the Council decision quoted above.

8. As for the new version of Article 7 (1), amendment 8 would oblige Member States to ensure that the highest possible level of safety standards and rules is laid down, applied and enforced. The Commission strongly believes that the excellent safety record of the railways must be maintained and perhaps even improved in some cases, but has serious doubts about imposing as a legal requirement the highest level of standards that is technically possible. Doing so would prevent safety regulators from comparing different safety measures to identify those that would most reduce accidents for a given cost. The consequence would be either that rail transport did not obtain the highest level of safety possible with the resources available or that it achieved a very high level at an extremely high cost. In the second case, clients would be driven to use road transport, which is on average much more dangerous than rail. The Commission therefore proposes keeping the actual wording providing a more than sufficient guarantee for maintaining the tremendous safety record of the railways.
9. The Commission also accepts the amendment of the additional paragraph 4 to Article 7 that it had proposed, but has simplified the text, as Member States may not have multi-annual national plans and contracts (amendment 9). It accepts the other amendments as they strengthen or clarify the text.
10. The Commission, however, refuses the other two amendments.

⁵ OJ L 184 du 17.7.1999, p.23

- the removal of the reference in recital 4 (now numbered 7) to the laying down of safety rules from the text proposed by the Commission (amendment 3).

The Commission's proposal would have made independent bodies, which themselves do not provide rail transport services, responsible not only for the enforcement of safety rules but also for laying them down. The same issues of fair and non-discriminatory treatment arise with both the establishment and the enforcement of safety rules, so the Commission believes that the recital should cover both. It emphasises that this obligation, to give responsibility for functions that determine access to bodies that do not operate rail transport services themselves, is required even with complete separation of infrastructure management and transport services into separate entities. This is in order to prevent such responsibilities being accorded to a railway undertaking, which would put that undertaking in the position of determining the conditions under which its competitors could use infrastructure to supply transport services. This would prevent fair and non-discriminatory treatment and be inconsistent with Articles 81 and 86, paragraph 1, of the Treaty.

- the amendment of the new version of the second indent of Article 1 proposed by the Commission (amendment 4-part)

The amendment of the second indent would delete the requirement that functions determining access to rail infrastructure be the responsibility of independent bodies that themselves do not provide rail transport services. For the reasons set out under the preceding amendment, such responsibilities should be given to bodies or undertakings that are independent of railway.

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

**amending Directive 91/440/EEC on the development of the Community's
railways**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71 thereof,

Having regard to the proposal of the Commission¹,

Having regard to the opinion of the Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

- (1) Council Directive 91/440/EEC⁵ should be amended to take account of experience with its implementation and of developments in the railway sector since its adoption, in order to ensure that its objectives are achieved.
- (2) In order to promote the efficient operation and development of the two distinct activities of transport services and infrastructure management, to ensure fair and non-discriminatory access to railway infrastructure, to make transparent the use of public support for the railway sector, and to create a solid basis for infrastructure charges, separate entities should be created for transport services and for infrastructure management after a transitional period.
- (3) Until the creation of these entities, distinct divisions should be created within a single undertaking for transport services and for infrastructure management and both the profit and loss accounts and the balance sheets of the two activities should be separated.
- (4) Rail liberalisation should, as with the other modes of transport, proceed in stages in conjunction with the parallel implementation of the necessary accompanying harmonisation measures.

¹ OJ C 321, 20.10.1998

² OJ C

³ OJ C

⁴ OJ C

⁵ OJ L 237, 24.8.1991, p. 25

- (5) In accordance with the principle of gradual liberalisation and in order to encourage competition and the entry of new operators, access rights should be extended at this stage to all railway undertakings for the international transport of goods on a defined network, called the Trans European Rail Freight Network (TERFN), including access to major terminals and ports.
- (6) It is necessary that, where railway undertakings and the international groupings which they constitute provide the services referred to in Article 10 of Directive 91/440/EEC, they benefit fully from the access rights laid down in that Article.
- (7) To this end, all railway undertakings and international groupings must be treated on a fair and non-discriminatory basis as concerns activities that condition access to infrastructure, and, consequently, the laying-down and enforcement of safety rules, including the investigation of serious accidents should be carried out by independent bodies or undertakings that themselves do not provide rail transport services.
- (8) To promote efficient management of infrastructure in the public interest, infrastructure managers should be given a status independent of the State, and freedom to manage their internal affairs, while Member States should take the necessary measures for the development and the safe use of railway infrastructure.
- (9) To promote the efficient operation of passenger and freight transport services and to ensure transparency in their finances, including aid for restructuring, it is necessary to separate the accounts of passenger and of freight transport services.
- (10) Two years after the date by which Member States have to comply with this Directive the Commission shall report on its implementation and make appropriate proposals.
- (11) Since the measures necessary for the implementation of this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁶, they should be adopted by use of the regulatory procedure provided for in Article 5 of that Decision.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/440/EEC is hereby amended as follows:

⁶ OJ L 184 du 17.7.1999, p.23

This text has been agreed upon a few days ago. The legally correct English version will be introduced as soon as it is available.

1. The second, fourth and fifth indents of Article 1 are replaced and a new third indent added, as follows:

“- by creating separate entities for the provision of transport services and for infrastructure management after the transitional period referred to in Article 6, paragraph 1, and, until the establishment of these entities, by creating distinct divisions within one undertaking and by separating the profit and loss accounts and balance sheets for each activity, and by awarding to a body or undertaking, independent from any railway undertaking, the responsibility for those functions determinant for equitable and non-discriminatory access to infrastructure, such as allocation of infrastructure capacity, laying down and application of a charging regime for its use and the issuing of safety certificates and licenses,

- by improving the financial structure of these entities,

- by ensuring access to Member States' networks for railway undertakings engaged in the international transport of goods and for international groupings of railway undertakings.”

2. The first and second indents of Article 3 are replaced by the following:

“- 'railway undertaking' shall mean any private or public undertaking whose business is to provide rail services for the transport of goods and/or passengers with a requirement that the undertaking must ensure traction.

- 'infrastructure manager' shall mean any body or undertaking that is responsible for establishing and maintaining railway infrastructure. This may include operating the control and safety systems.”

5. Article 6 is replaced by the following:

“1. Member States shall create separate entities, each with its own legal personality, for the provision of transport services and for the management of railway infrastructure. Public funds paid to one of these entities may not be transferred to the other.

Member States shall create these entities not later than two years after the date by which they had to comply with European Parliament and Council Directive .../..EC.

Member States may not award the responsibility for those functions determinant for equitable and non-discriminatory access to infrastructure, such as allocation of infrastructure capacity, laying down and application of a charging regime for its use and the issuing of safety certificates and licenses, to undertakings operating transport services themselves.

2. Until Member States create separate entities for the provision of transport services and for the management of railway infrastructure, they shall require the organisation of distinct divisions for each activity within a single undertaking. They shall also take the measures necessary to ensure that separate profit and loss accounts and balance sheets are kept and published, on the one hand, for business relating to the provision of transport services and, on the other for business relating to the management of railway infrastructure.

Public funds paid to one of these two areas of activity may not be transferred to the other.”

4. Article 7, is amended as follows:

(a) Paragraph 1 is replaced by the following:

“1. Member States shall take the necessary measures for the development of their national railway infrastructure taking into account, where necessary, the general needs of the Community.

They shall ensure that safety standards and rules are laid down, applied and enforced, with appropriate monitoring in such a way as to guarantee equitable and non-discriminatory access to infrastructure. These functions including the investigation of all serious accidents shall be performed by bodies or undertakings that do not provide rail transport services themselves and are independent of bodies or undertakings that do so.”

(b) Paragraph 2 is deleted; paragraph 3 becomes paragraph 2.

(c) The following paragraph is added:

“4. Within the framework set by Community law and the general policy determined by the State, the infrastructure manager shall draw up a business plan including investment and financial programmes. The plan shall be designed to ensure optimal and efficient use and development of the infrastructure while ensuring financial balance and providing means for these objectives to be achieved.”

5. The following paragraph shall be added to Article 9:

“4. Separate profit and loss accounts and balance sheets shall be kept and published, respectively, for business relating to the provision of passenger transport services and for business relating to the provision of freight transport services. Funds paid to either of these two areas of activity shall be shown separately in the relevant accounts and shall not be transferred to the other.”

6. Article 10 is replaced by the following:

“1. International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertaking constituting the said groupings are established.

2. Railway undertakings within the scope of Article 2 shall be granted, on equitable conditions, access to the infrastructure in other Member States for the purpose of operating international combined transport goods services.

3. Railway undertakings within the scope of Article 2 shall be granted, on equitable conditions, access to a network, called the Trans European Rail Freight Network, as defined in the annex, for the purpose of operating international freight transport services.

4. Any railway undertaking engaged in rail transport services shall conclude the necessary administrative, technical and financial agreements with the infrastructure managers of the railway infrastructure used with a view to regulating traffic control and safety issues concerning that transport. The

conditions governing such agreements shall be transparent and non-discriminatory.”

7. The following article is added:

“Article 10a

1. The Trans-European Rail Freight Network consists of the following elements:
 - a) Railway lines as indicated in the maps in the Annex.
 - b) The infrastructure managers shall offer diversionary routes, where appropriate, particularly around congested infrastructure in the sense of Directive 2000/.../EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. When these routes are offered, overall journey times shall be safeguarded as far as this is feasible.
 - c) Track access to terminals serving or potentially serving more than one final customer and to other sites and facilities, including feeder lines to and from these.
 - d) Track access to and from ports as listed in the Annex, including feeder lines.
2. The feeder lines mentioned above cover, at either end of the journey, 50km or 20% of the length of the journey on the railway lines referred to in paragraph 1a), whichever is greater.

Trains may be joined and/or split and the different sections may have different origins and destinations.

Supply of services in terminals and ports is guaranteed to all railway undertakings and can be subject to restrictions for railway undertakings only if viable alternatives exist.”

8. Article 11 is replaced by the following Articles 11 and 11a:

“Article 11

1. Member States may bring any question concerning the implementation of this Directive to the attention of the Commission. Appropriate decisions shall be adopted by use of the advisory procedure referred to in Article 11a(2).

At the request of a Member State or on its own initiative the Commission shall, in a specific case, examine the application of Article 10, paragraphs 1 to 4 and, within two months of receipt of such a request, decide by use of the same procedure whether the related measure may continue to be applied. The Commission shall communicate its decision to the European Parliament, the Council and to the Member States.

2. Where measures of general scope designed to apply essential provisions of this directive are to be amended, appropriate decisions shall be taken by use of the regulatory procedure referred to in Article 11a(3).

Article 11a

1. The Commission shall be assisted by a committee composed of representatives of the Member States and chaired by the representative of the Commission (hereinafter referred to as "the committee").

2. Where reference is made to this paragraph, the advisory procedure provided for in Article 3 of Decision 1999/468/EC shall apply.

3. Where reference is made to this paragraph, the regulatory procedure provided for in Article 5 of Decision 1999/468/EC shall apply, in compliance with the provisions of Article 8 thereof.

The period provided for in Article 5(6) of Decision 1999/468/EC shall be three months."

9. Article 14 is replaced by the following:

"Two years after the date by which Member States had to comply with European Parliament and Council Directive .../EC, the Commission shall submit to the European Parliament, the Economic and Social Committee and the Committee of the Regions and the Council a report on the implementation of this Directive accompanied by suitable proposals on continuing Community action to develop the railway market and the legal framework governing it."

Article 2

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than one year following the date of entry into force of this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*

ANNEX

Ports

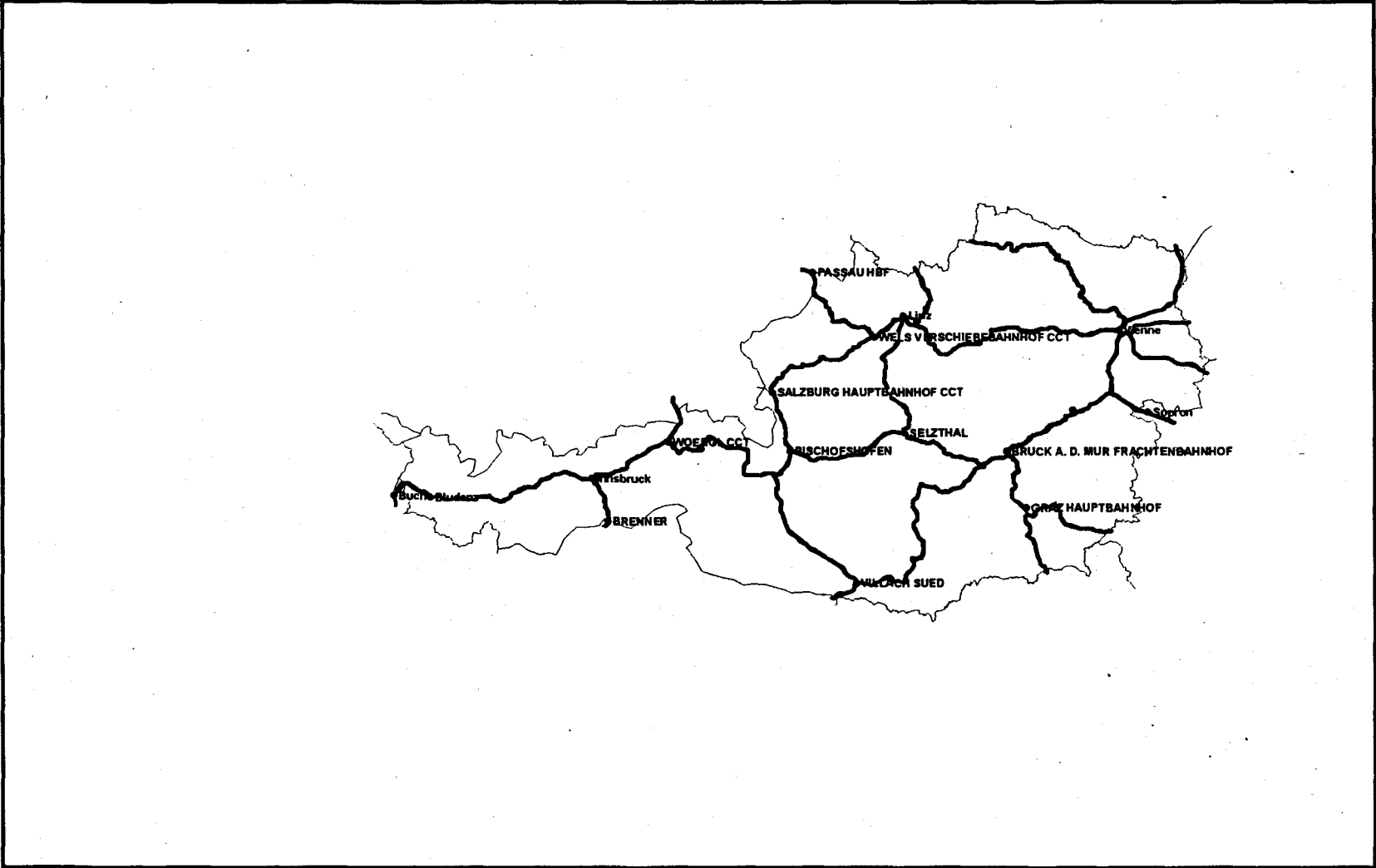
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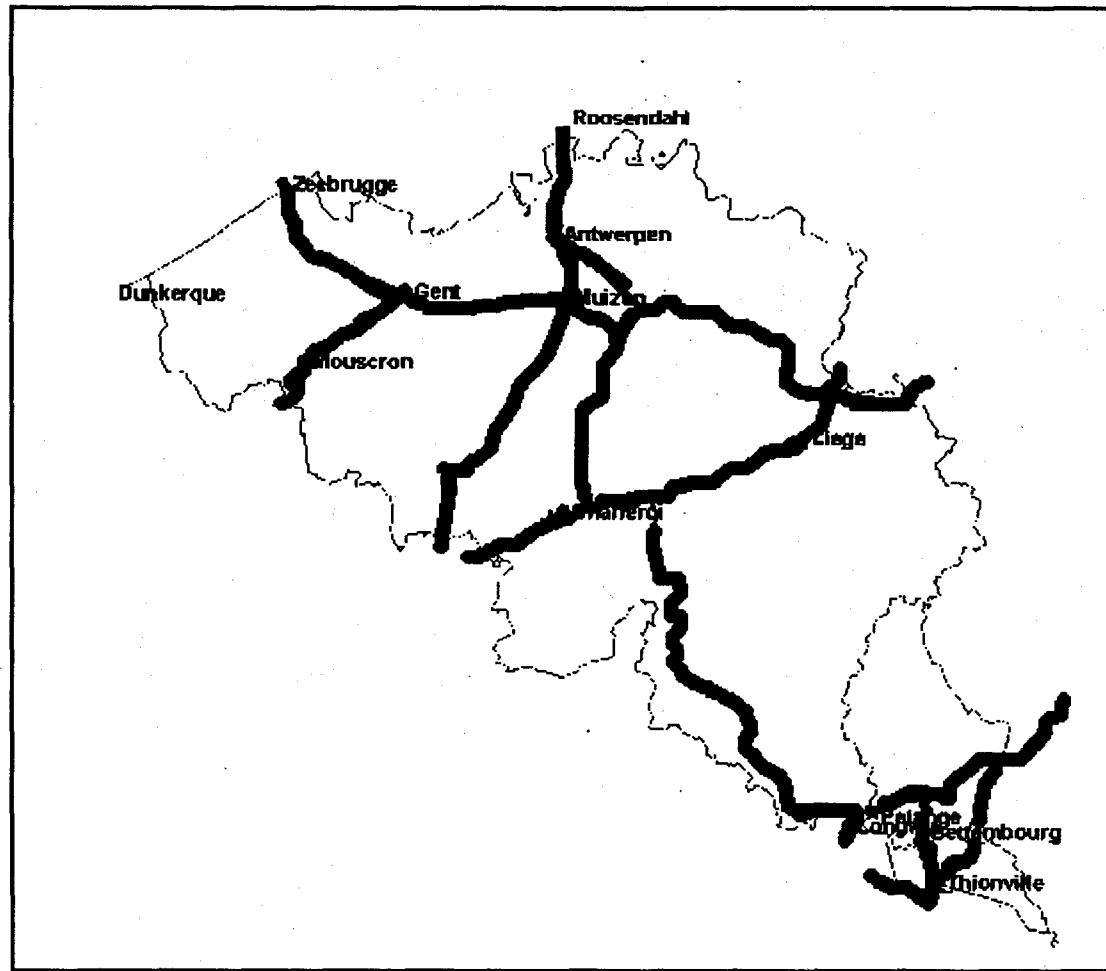
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Maps

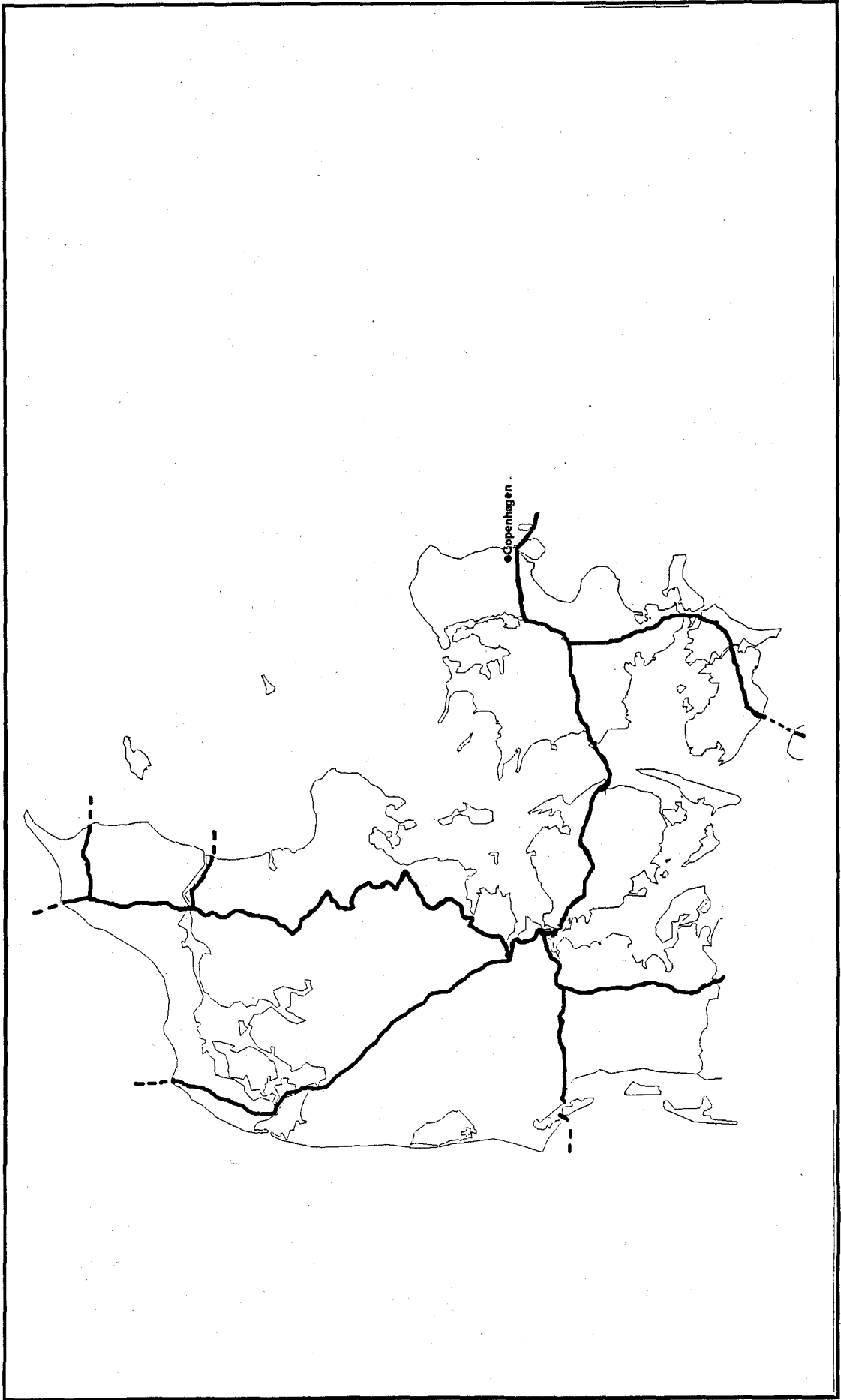
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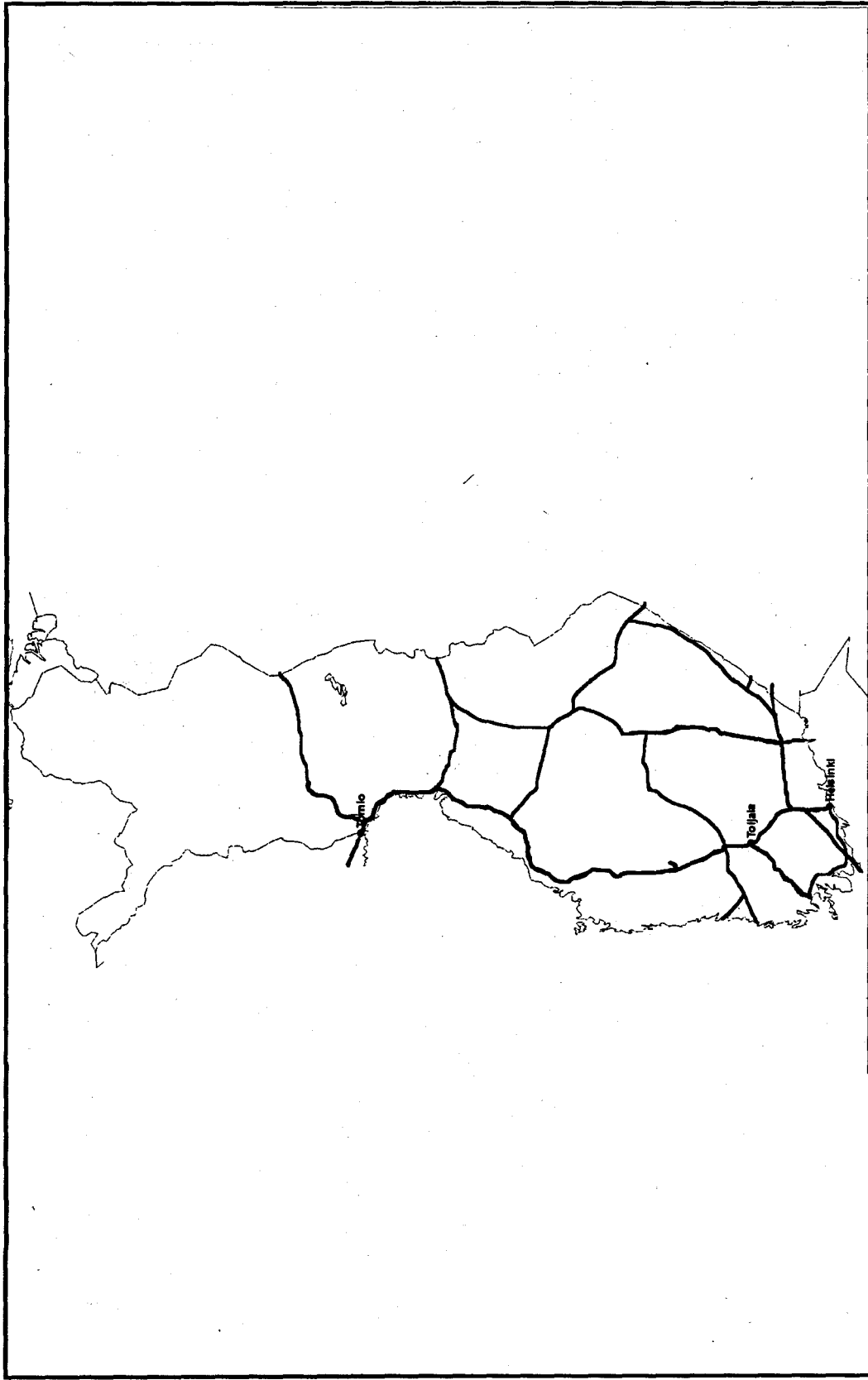
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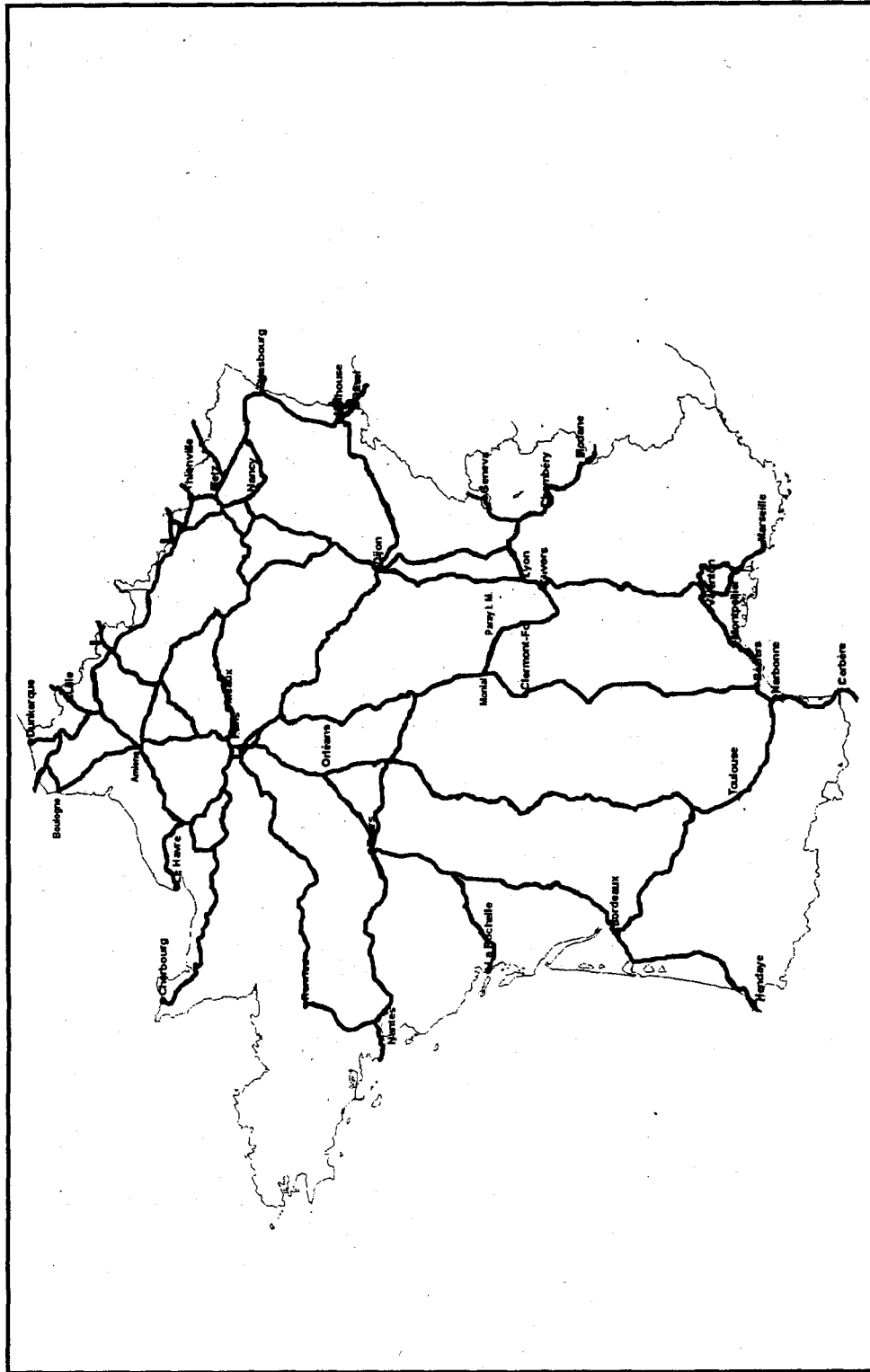
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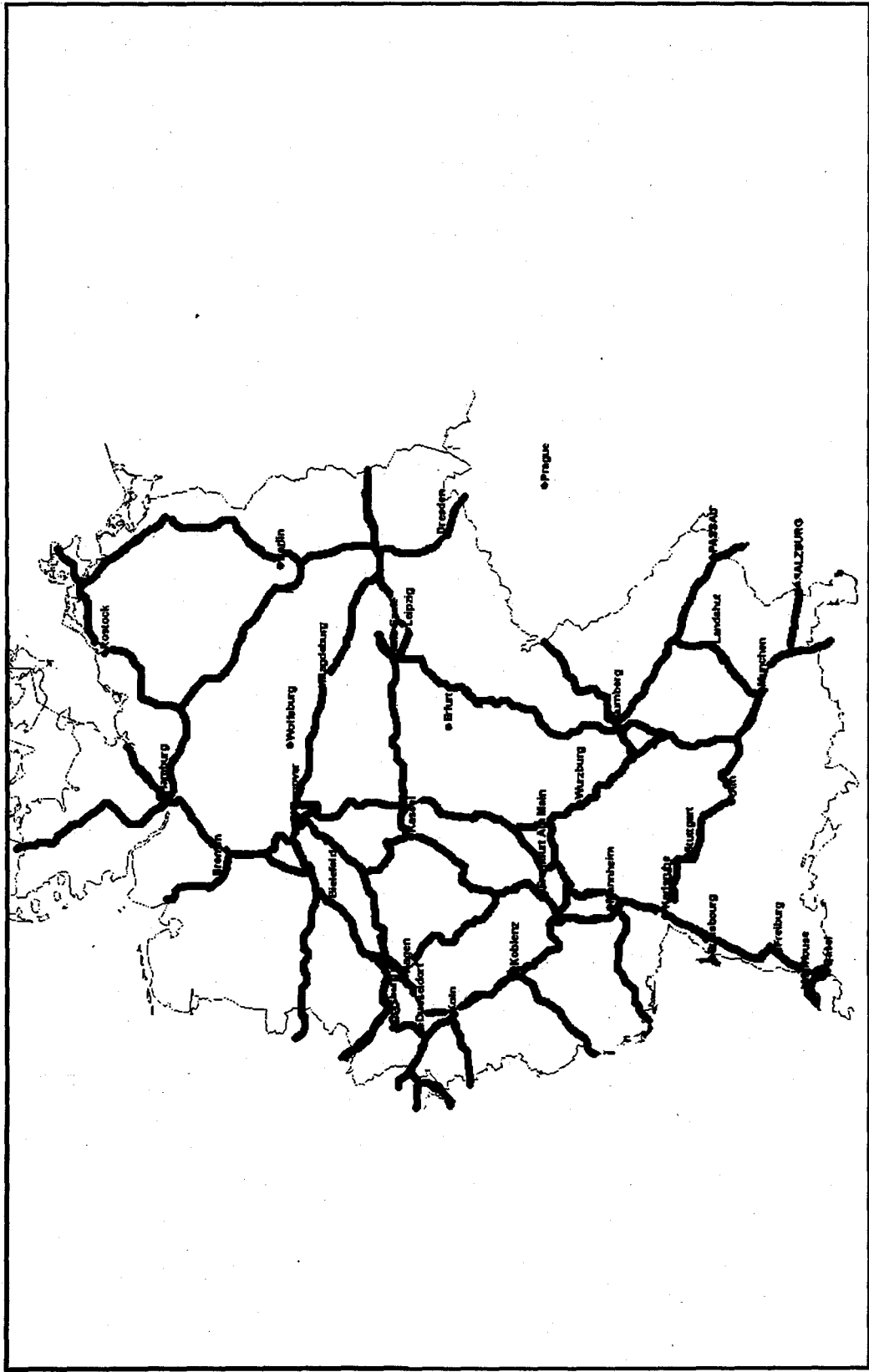
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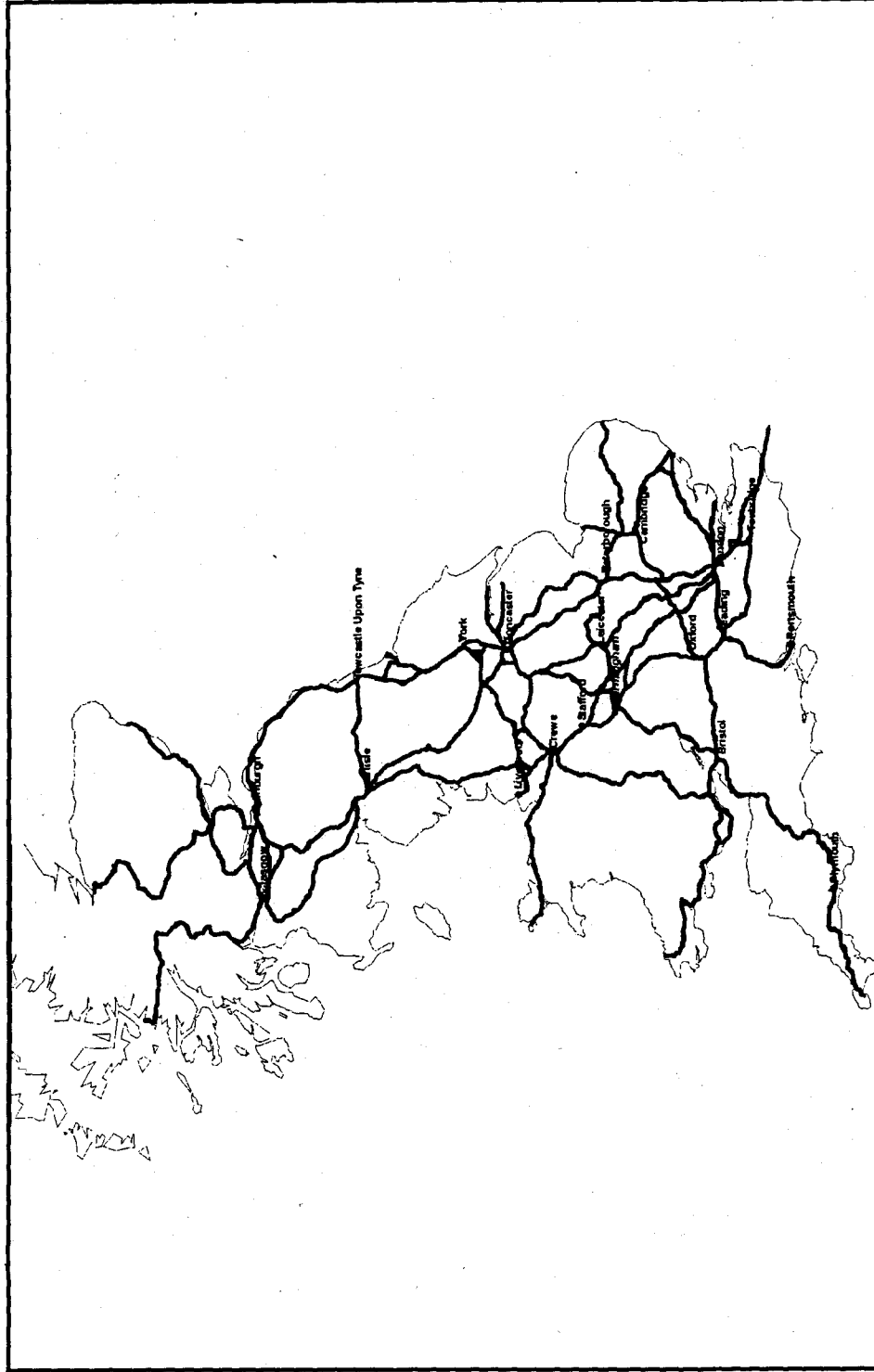
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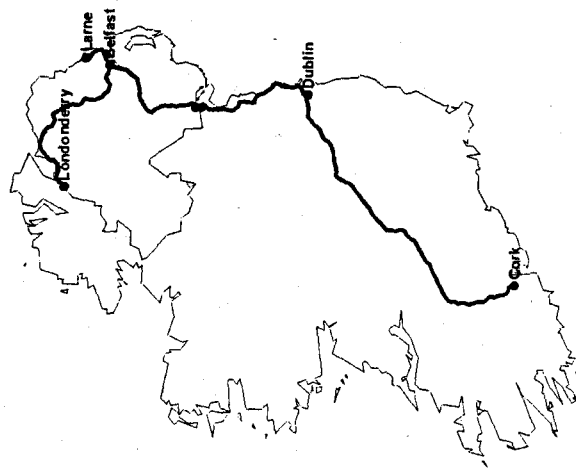
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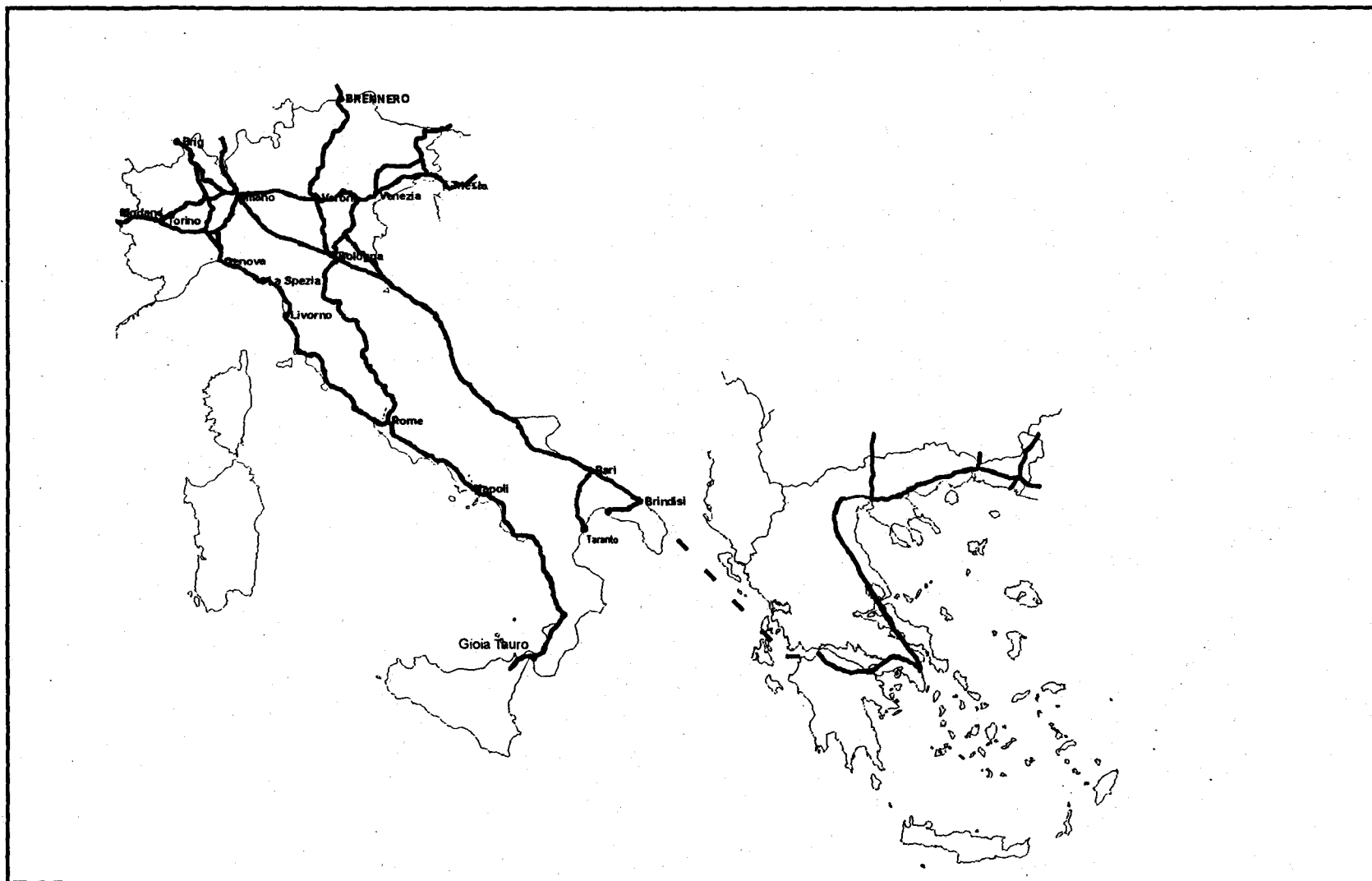
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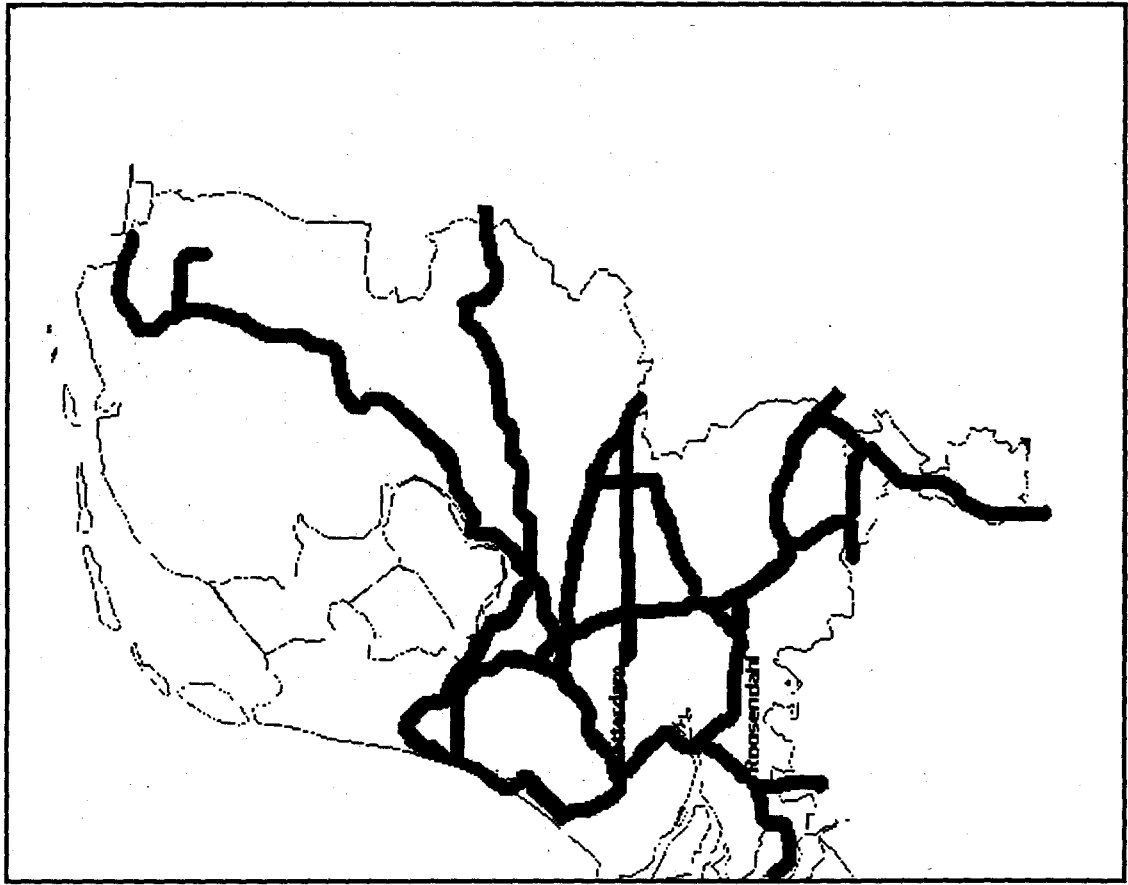
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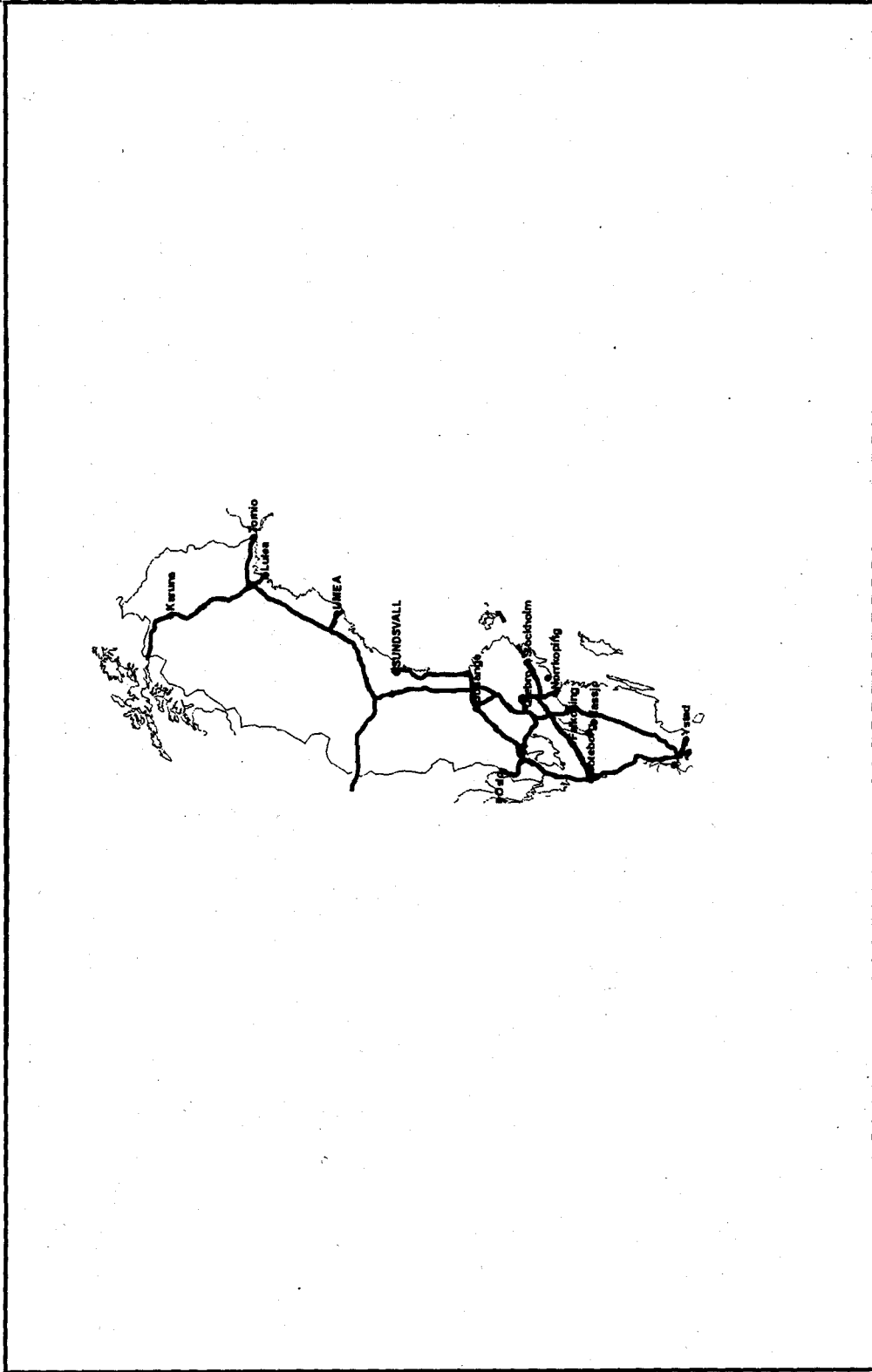
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