TAX EVASION. THEORETICAL AND PRACTICAL EFFECTS OF THE PROVISIONS OF ARTICLE 10 OF LAW 241/2005

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Abstract: *Law No. 255/2013 governs transient situations resulting from the entry into force of the new Criminal Code, and by art. 79 points 1 and 2 modified the name of chapter III, and the content of paragraph 1. 1 of art. 10 of law No. 241/2005 preventing and combating tax evasion. The disposal of the normative in force stipulates only a question of reduction of sentence, but considering the importance of the effects of reducing the penalty, and also the causes of unpunishment in the jurisprudence in relation to incidence of art. 5 pen. code through this work we plan to do a full analysis and of the provisions of article 10 paragraph 1, in the version in force before 1 February 2014. Following the legal approach taken, I've found that regulation causes reduction of sentences and " unpunishment " for an offence of tax evasion is not sufficiently clear and accessible to the recipients of the regulatory framework, being imperative needed the intervention of the legislator with the accuracy of the contents of the legal norm, with the consequence of applying them consistently. At the same time, we appreciate that it is necessary to regulate the alternative measures to ensure that those who have committed acts in the field of economic and financial crime should be encouraged to cover in full the damage caused to the consolidated budget of the State.*

Keywords: *tax evasion; sentence reduction causes; cause of atypical punishment; substitution of punishment; civil party claims coverage.*

JEL classification: *K0; K3; M0.*

1. Overview

Currently, the extensive process of judicial reform has brought changes of substance in relation to the field of criminal justice.

The new regulation aims to satisfy the criminal procedural requirements imposed by the predictability of criminal procedure, the requirement imposed by the European Convention for the protection of human rights and fundamental freedoms. In order to deal with transitional situations resulting from the entry into force of law No. 135/2010 regarding the criminal procedure codexiv was adopted the law No. 255/2013xv.

In the category of regulations that have been amended by law No. 255/2013 we will include its new name of chapter III and para. 1 of art. 10 of law No. 241/2005 preventing and combating tax evasion (art. 79 point 1 and 2).

Thus, chapter III of law No. 241/2005 originally called *"causes of unpunishment and cause of reduction of sentences "* was renamed *"causes of reduction of sentences, prohibitions and decay".*

Next, we propose to analyze aspects pertaining to the effects of the reduction of punishment, but also causes for unpunishment, taking into account their importance in the judicial practice in terms of incidence of art. 5 pen. Code.

2. Short references regarding the name of the chapter III of Law No. 241/2005

In the legal literature criticisms has been expressed with regard to the name chosen by the legislator for chapter III of Law No. 241/2005.

As regards the expression of the legislator in the name of marginal chapter III of the law we agree with the views outlined in the doctrine in the sense that it is improper (*M.A. Hotca ș.a*)xvi, we find ourselves in the presence of a legislative technique error (*B.Vîrjan)xvii.*

We consider the arguments we present mostly pertinent. Thus, the thesis according to which we subscribe also that the residential designation of chapter III is flawed in the old regulations, whereas the legal terms used are improper, inappropriate to the content of the legal norm. If the name of the cause of reducing the penalty is warranted for the first sentence of art. 10, whereas the limits of the punishment prescribed by law shall be reduced by half (both in the original version, and the provision in force), the second sentence referred to a case of replacing the prison sentence with the sanction of the criminal fine, and final thesis did not envision a cause of unpunishment, as inserted in the chapter title, but a question of special unpunishment provided in a special law, or in other words a question of impunity (*C.V.Neagoe*)xviii. In the case of the latter thesis, we go along with other authors (*B.Vîrjanxix, M.Șt.Minea, C.F.Costaș, D.M.Ionescuxx*) that we are in the presence of a cause of criminal liability (*M.A. Hotca ș.a*)xxi, whereas in the case of the offence of tax evasion we cannot talk about the impact of a case which removes criminal responsibility, as it was referred to in art. 90 of the penal code of 1969. Also, we cannot accept the argument that we're not in the presence of a cause for unpunishment, because such a question of defending the penalty committing the offence, or in paragraph 2 of art. 10 there is a reference that can revert the benefit granted if the perpetrator commits a new criminal offence of tax evasion over a period of five years. (*C.I.Gliga)xxii.*

We've highlighted these issues not just to show the uninspired choice of the legislator, but mostly because we want to develop the implications in the judicial practice, the lack of rigor of the regulatory provision.

3. Effects

For the purpose of recovering the full damage caused by the commission of an offence of tax evasion before entry into force of the new Criminal Code, the legislature has regulated in art. 10 three special theses, the only condition being that they are implementing that which refers to the amount of damage and repaired by the defendant, until the first judicial term.

For practical reasons, considering the numerous cases pending before the courts in court referral was made for acts committed prior to changes made by Law No. 255/2013 in the following we will examine not only the effects of reduction of the sentence Law no.241 / 2005, after changes, but also the causes of punishment and other causes of reduction of penalties under the law to prevent and combat tax evasion in the previous version.

Since the three categories of cases of punishment or reduction of sentence under article. 10 (previous version) are differentiated on the basis of the damage caused by the defendant, it should be noted that the three levels of damage are: 1). Damage caused and recovered up to 50,000 euros, when it becomes as incident because of the punishment provided for in Article 10 .1 sentence IIIrd thesis; 2). Damage caused and recovered for more than 50,000 euros, but up to 100.000 euros when the incident is due to the replacement of the fine provided for in Article 10 paragraph 1, sentence IInd thesis; 3). Damage caused and recovered for more than 100,000 euros, when it comes to reduction of sentence, as provided by article 10 paragraph 1 first thesis.

The three special thesis produce different effects, as follows: Ist thesis provides a case of halving the limits of imprisonment; thesis II provides optional replacement of imprisonment with a penalty fine; thesis III regulates a case for punishment, the effect of which is to remove the penalty of imprisonment, replacing it with an administrative sanction, such as extra investigation.

As from February 1, 2014, art. 10 para 1 provides only a case of halving the penalty limits provided by law, regardless of the amount of the civil party claims.

a) In **para 1 of art.10** of the law, in the previous form, but also in its current form the legislature has regulated a question of reduction of sentences, by ***compulsory*** reducing by half the minimum and maximum limits, when the damage was repaired in full by the culprit until the first term. We are so in the presence of a legislative text, which obliges the Court to halve the special limits of punishment provided for by law, in the case of detention, the provisions of article 10 paragraph 1.

If the conduct referred to in paragraph 1, in the version preceding the entry into force of law No. 255/2013 occurred damages of more than 100,000 euro, become incidental the provisions of article 9 paragraphs 1 and 2 of law No. 241/2005. Thus, the legal text provides that if the conduct referred to in paragraph 1 of article 9 have been caused by a damage of more than 100,000 euro, the equivalent of the national currency, the minimum punishment provided by law and the maximum limit is to increase by two years (according to the current regulations -5 years).

If the same acts occurred a damage of more than 500,000 euros in the equivalent in national currency shall be applicable the provisions of art. 9 para. 3, so that the minimum punishment provided by law and its maximum shall be 3 years (i.e. 7 years, according to the current regulations). Therefore, if the case of full cover of damage of more than 100,000 euros, according to the abovementioned legal texts first limits of punishment will be increased by 2 years (5 years), after which this limit will be reduced to one half (art. 9 para. 2). The situation is similar to the case of and art. 9 para. 3 of the Law.

Considering that we are not in the assumptions of a contest between mitigation and causes of aggravation, but some special cases of reduction of punishment, provisions of article 79 para. 3 of the new criminal code not incidental.

The cause of the reduction of the penalty provided for in art. 10 paragraph 1 can be applied to mitigating circumstances and the Court, under article. 75 pen. code, in which case we are talking about a cascade reduction of the punishment. Some examples in this regard: *the defendant A, in the period from March 2015 to November 2015 has not revealed the commercial operations in the accounting documents, causing a prejudice to the State budget of 150,000 euro, but until the first term has covered the integral civil party claims (special mitigation question of liability), had an honest conduct, has made efforts to eradicate the consequences of*

the offence, is a young man, at first contact with the criminal law (mitigating circumstances provided for in article 76 para 2 pen code.) which is why he will benefit special causes ***successively*** *reducing the penalty and mitigating the effects of the circumstances provided for in article 76 Pen. Code. Specifically, if the amount of the damage is over 100,000 euro, the limits of punishment provided for the offence of tax evasion under article 9 lit. (b) and para. 2 (2-8 years) shall be increased by 5 years (7-13 years), after which it will be reduced by half (3 years and 6 months to 6 years and 6 months), then these limits will be reduced by 1/3 (2 years and 4 months to 4 years and 4 months), the final punishment to be established between these limits.*

*A*ccording to judicial practice, the same circumstance cannot be accepted (full coverage of damage) as a ground for reduction of sentence and also as a mitigating legal, provided by art. 75 paragraph 1 letter d. Pen. Code, because it would give the same circumstances a double efficiency, which is unacceptable.

b) In **the 2nd thesis of art.10** (previous version**)** established as a cause of optional replacement of imprisonment with fine penalty if damage is caused and recovered up to 100,000 euros in the equivalent currency. We are in the presence of an absolute reduction of sentence that may be imposed only for offenses committed before 1st of February 2014. From the expression of the legislature, by using the term, it is possible, results a light sanction - a fine - this is optional. The judge can decide on whether the application is justified or not in these causes, namely the penalty fine.

Inn doctrine it is considered that, as long as in the case of the other two special sentences under article. 10 paragraph 1 theses I and III in the previous form is provided imperatively the need to implement legal provisions that mitigate the sanction, there is no justification regarding this issue replacement to establish another penalty enforcement regime.xxiii

In the same direction, with extra arguments, has been argued that it is not fair to assume that the single effect of the application of this cause of mitigation would alternate the character of the punishment, in the sense that the Court would be able to choose between jail and fine punishment, while in case of incidences of art. 10 thesis I (previous version), which governs the facts with higher social hazard, necessarily applies to the cause of reducing the penalty. Furthermore, it was argued that if the extensive process of individualization of the sentence the Court would interpret strictly the thesis I article 10 and would consider that the implementation of the prison sentence is necessary, then it would be required to make application of the thesis I article 10, relating to the reduction half prison sentence, because otherwise, the defendant would not be eligible for any of the causes to mitigate the punishment provided by law. Another argument which was brought was that the first sentence of art. 10 (both versions of the regulations) does not refer to limit the damage, but can be inferred from the interpretation of the other two sentences (referred to in the original version). At the same time, if thesis I would be accepted and in case of damage under 100,000 euro, we would end up in a position to apply simultaneously to two causes of attenuation, which is inadmissible.xxiv

Even if the provision of Article 10 thesis II is objectionable, in relation to the wording, it empowers the Court to consider that possibility for the legislated judge to apply the penalty of fine, taking into account the general criteria of individualization of punishment provided by Article 72 of the Penal Code . 1969 (Article 74 of the Penal Code.).

After changes by Law No. 255/2013 of the above are not current, but practical relevance for acts until 1st of February 2014 as a result of the incidence of article 5 of the Penal Code on the application of penal law more favourable to the final judgment of the case.
The text art. 10 thesis II (predecessor) created and creates difficulties in judicial practice due to failure of the legislature to determine limitations replacing imprisonment penalty of fine.
If we do an analysis of the provisions of article 8 and 9 of the Law in the previous version, through the limits of punishment, we find that for these crimes is provided only custodial sentence, without mentioning the text content limits replacing imprisonment penalty of fine. Obviously because of this omission by the legislature are incidents, provisions of Article 63 paragraph. 3 Penal Code. 1969.
To improve the operability of the legal text of the Law, recriminations of tax evasion must be corroborated, which is the only sanctioning regime of imprisonment with art. 10 thesis II, which stipulates the possibility of applying the criminal fine. Thus, if the incidence art. 10 thesis II the court must determine a punishment by a fine between 500 lei and 30,000 lei, in the case of article 63, paragraph 3 of the Penal Code. 1969 (you should be able to choose between imprisonment or the fine).
In a reviewxxv it has been argued that article 63 Penal Code of 1969 the provisions of art. 10 thesis II were inoperative in application.
We appreciate that the legislator had to intervene for the purposes of inserting the content of fine penalty rule limits replacing imprisonment with penalty fine, but without changing the text, there is no other legal text that can be applied only Article 63 of the Penal Code 1969.
An issue of the enforcement of judgments that ordered the condemnation of the defendant to the penalty fine is one in which the convict in bad faith fails from the execution of the fine. In such a situation we may wonder if the provisions of article 63/1 Pen. Code can be applied previously, when the fine was ordered on the basis of art. 10 thesis II (previous version)?
Professor Matei Basarab showed that the replacement of the fine with imprisonment when the convict is absconding in bad faith is only possible if the penalty of a fine imposed by the text of criminality alternative imprisonment, cannot be applied if the penalty fine is due to retention of mitigating circumstances, because if we would apply Article 63/1 it would mean that the court returns the mitigating circumstances, removing its effectxxvi.
Other authorsxxvii consider that where the condemned evades in bad faith from the execution of the fine, the Court will be able to replace, in accordance with article 63, penalty fines with the prison limits laid down for the committed offence, taking into account the part of the fine that has been paid. In the event that the Court applies the penalty fine pursuant to article 10 IInd thesis, the limits of penalty will remain as set out in art. 63 para. 3 Pen. Code, not incidental for the provisions of thesis I, because it gets to the harnessing twice the provisions relating to mitigation of the penalty, which runs counter to the wishes of the legislature.
c) **In art. 10 para.1 thesis III** , in the version in force prior to February 1st 2014 provides that "*if the damage caused and recovered under the same conditions is up to the equivalent of 50,000 euro in national currency, it is applied an administrative sanction, which is recorded in the criminal record".*
*T*he legal text has governed a cause of unpunishment in favour of the accused which aims to cover in full, during prosecution or judgment, until the first term of the Court,

a damage of up to 50,000 euros. This provision has been replaced the regular punishment of prison with an administrative penalty.
The words "*administrative penalty*" have been interpreted as referring to the administrative penalties laid down by article 91 of the Pen.Code of 1969 - rebuke, rebuke with a warning, fines from 10 to 1000 lei lei. The correspondence in the new Criminal Code of this institution lies in the article. 80 (giving up to the punishment's application) and the penalty shall be governed by the provisions of article 81 (warning).
However, this legal provision can be applied only to offences committed before the date of entry into force of law No. 255/2013, whereas this regulatory action or decision repealed and Thesis II & III of article 10.
As regards the mechanism for the application of administrative penalty inserted into the content of art. 10 paragraph 1 of the Law, prior to the 1st of February 2014, specialized legal literature formulated more opinions.
Thus, some authorsxxviii have argued that article 10 para. 1 sentence III is inapplicable, since it contains provisions which cannot be transposed into practice for the following reasons:
→ Art.91 Pen. Code of 1969 provides administrative sanctions, no administrative penalty;
→the cases of unpunishment provided by this legal text differs from other general causes or special unpunishment, because it requires the application of administrative penalties which shall be entered in the criminal record, its application being compulsory, not optional;
→ the case of unpunishment cannot be applied during investigationxxix
Other authorsxxx have argued that the hypothesis provided by art. 10 thesis III is outside the scope of regulated unpunishment in the national law, it's being simply a choice not inspired by the legislature, which has not pursued this rule to defend the one committing a particular offence, but only to replace a criminal liability.
We agree with the view expressed in the doctrinexxxi in the sense that regulated hypothesis is an atypical case of unpunishment, which established another form of legal liability, which triggers the application of administrative sanctions under Article 10 paragraph 1 thesis III and not the provisions of Article 90 of the Penal Code of 1969.
After the entry into force of the law to prevent and combat tax evasion (July 27, 2005), the punishment cases could not be applied during the prosecution, whereas Article 11, paragraph 1, letter c of Pen. Procedure Code of 1969 was not expressly provided the possibility that the prosecutor would terminate the criminal proceedings under article 10 let. i / 1, only the courts could find within this legal text. Subsequently, art. I point 2, 3 of the **Law no.356 / 2006** amended the provisions of Article 11 point 1 letter c and Article 13, paragraph 3 c Pen. Procedure Code of 1969, meaning that the prosecutor may order the cessation of prosecution under article 10 paragraph 1, letter i/ 1 Pen. Procedure Code of 1968.
In judicial practice and currently there is controversy regarding the solution to be delivered and the legal basis that is required to be deducted in respect of the provisions of art. 10 of Law no.241 / 2005. Thus, on this point of law, solutions have been different, justified, in our opinion, wrongly:
a) The legal provision invoked as the basis of **payment** as that covered in **paragraph c of Article 16**, as it relates to the lack of evidence that the person has committed the offense. The solution was argumented on the provisions of article 19 of Law no.

255/2013, according to which when, during the trial, it appears that on an act committed before the entry into force of the new Penal Code, the provisions of Article 18/1 of the Penal Code 1969 as more favourable criminal law, the prosecutor may order dismissal, the judge order the payment, under the Code of Criminal Procedure. According to Art. 18/1 Pen. Code of 1969 the prosecutor is obliged to take account the **Decision no.265 / 2014 of the Constitutional Court**, that show that provisions of Article 5 of the Penal Code are constitutional insofar as the provisions of the law do not allow combining successive establishing and applying more favourable criminal law. Paragraph 3 of **Article 18 / 1 Pen. Code of 1969** expressly provides that if the facts do not show the seriousness of a crime the prosecutor or the court may impose one of the penalties of an administrative nature under article 91 of the Penal Code of 1969.

b) Other courts have ruled payment solutions under the provisions of **article 16 lit. Pen. procedure code read in conjunction with article 91 Pen. Code of 1969.** It was argued that one of the conditions provided by law to renounce to penalty or conditional sentence, is that the act is an offense (art.396 paragraph 2 C. pr. Code.) , or in the two cases in question this condition is not met and therefore the uniform application of more favourable criminal law under the law;

c). another solution was an application of art. 90 Pen. Code of 1969, which refers to the replacement of criminal liability with a penalty of an administrative nature, which requires **termination of criminal proceedings** based on Art. 11 para 2 letter b combined with article 10 paragraph 1, letter i Pen.procedure code of 1968.

We consider that the courts that have given the above described solutions started from a wrong premise-that the texts in question relates to the impact of the provisions of article 91 Pen.code of 1969. In reality, art. 10 of law No. 241/2005 does not make references to the lack of concrete social danger of the deed, with the consequence of the application of administrative penalty, but directly of the application of the penalty. However, under the rules and regulations prior to February 1st 2014 the application of administrative penalties in the criminal trial was in three separate cases: payment, pursuant to article 10, letter b/1 Pen. procedure code of 1968, in which case the deed, as a result of the lack of concrete social danger was not considered a criminal offence, although it met the constitutive elements of a criminal offence; termination of criminal proceedings, pursuant to article 10 letter I Pen. Procedure code of 1968, when the deed was a criminal offence, but the criminal liability was replaced by the administrativexxxii aspects; the cessation of the criminal process, pursuant to art. 10 letter i/1 Pen. Procedure code of 1968, in the case of an incidence of unpunishment provided by art. 10 paragraph 1 thesis III of law No. 241/2005 (previous version of the entry into force of law No. 255/2013). Therefore, we think that when applicable the provisions of law No. 241/2005 or of the penal code of 1969, in relation to the provisions of article 5 pen. Code, ***the solution in the case of the incidence of unpunishment at the present time cannot be other than cessation of the criminal process, and the basis is provided by article 16 para.1 letter h Pen. Procedure code combined to art. 10 paragraph 1 thesis 3 of law No. 241/2005 (previous version), considering that the provisions of the criminal procedure law are of immediate applicability.***

A particularly important issue, with practical implications, is on the provisions of **Article 18 Pen. Procedure code (Article 13 Pen. Procedure code of 1968).**

Article 18 provides that, *if amnesty, prescription, withdrawal of a complaint of existence of a case of punishment or not imputed or if a case of Cancellation of criminal investigation, the defendant may request further trial.*
This text shows the provisions of dispositions art.13 Pen. Procedure code of 1968.
In relation to these provisions the following question arises: the defendant who was in court benefits of unpunishment as seen in art. 10 para 1 thesis III (predecessor of Law no.241 / 2005) may request further trial?
The answer can only be affirmative, since even if the text of art. 10 on the punishment due to atypical necessarily require administrative sanction and entered in the criminal record, preceded implicit recognition of the deed and payment of damages, the defendant may request the continuation of criminal proceedings, under Article 18 Pen. Procedure code, to prove his innocence. If the defendant proves that he did not committed the offense of tax evasion and does not owe any money to the Ministry of Finance represented by ANAF as civil party in question, may request the reimbursement of up to 50,000 euros. The contrary solution would violate the fairness of the trial provided by art. 8 Pen. Procedure code and the right to defend inserted in the content of art.10 of Pen. Procedure code.

4. Conclusions

The legal issues raised by the provisions of Law no.241 / 2005 on preventing and combating tax evasion, outlined in this study, the current legal and economic conditions which highlight the need to prevent tax evasion, require the intervention of the legislature, on one side, and on another side to determine accurately the content of the legal norm, the consequence of applying them consistently and uniquely, to fully meet the requirements imposed by European regulations.xxxiii
Tax evasion is one which lies both at national and at international level, being one of the most common offences in the economic-legal field.
The fight against tax evasion doesn't have severe penalties (ineffective, given the large number of cases with this object, on the role of the courts), but also alternative measures or more lenient criminal penalties (fines), through which those who committed such acts should be encouraged to cover in full the damage caused to the consolidated budget of the State. Regulation causes reduction of sentences for offences of tax evasion must be clear, accessible to the recipients of the regulatory framework, in order to avoid problems of interpretation of the law. At the same time, it would require that the content of law no 241/2005 should be regulated penalties contravention with respect to acts of tax evasion as a lower social hazard (see model of some countries such as Luxembourg, Switzerland, Austria).

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Notes:

I. Law No. 135/2010, Publ. în M. Of. No. 486/15.07.2010.
II. Law No. 255/2013 for the implementation of law No. 135/2010 code of criminal procedure and for modifying and completing some legislative acts containing provisions of the criminal procedure law. publ. în M. Of. No. 515/14.08.2013.
III. See *M. A Hotca coord.,M. Gorunescu, N. Neagu, M. Dobrinoiu, R. F Geamănu*, *Offences provided for special laws, commentaries and explanations*, Edition 3, Ed. C.H. Beck press, Bucharest, 2013, p. 225.
IV. See B. Vîrjan, Offence of tax evasion, Edition 2, Ed. C.H. Beck Press, Bucharest, 2016, p. 298-299.
V. See C. V. Neagoe, *Cases of unpunishment, Tax evasion,* Penal Right Magazine no.2/2006, p 82.
VI. See B. Vîrjan,*op. cit*,p 300.
VII. See M. Șt. Minea, *C .F .Costaș, D .M. Ionescu, Law of Tax evasion for commentaries and explanations* Ed. C. H. Beck, București,2006, p150.
VIII. See M. A. Hotca, *op. cit*, p226.
IX. See C. I. Gliga,, *Tax evasion. Regulators. Doctrine. Case-law*,Ed. C. H. Beck, București, 2007, p117.
X. See M. Șt. Minea ș. a, *op. cit,* p 162.
XI. See B. Vîrjan, *op. cit,* p 337.
XII. See Gh. Neacșu, *Some issues raised by the application of art. 10 para 1 of the Law on prevention and combating tax evasion no.241 / 2005,* Revista Dreptul nr.3/2006, p169.
XIII. See M. Basarab, *Penal right,Overview vol. I,* Ed. Lumina Lex, București,1997, p 239.
XIV. See R.D.G. Bârdan, *The legal individualisation of imprisonment under article 10 of the Law on tax evasion,* publ. în Revista Pro Excelsior nr.1/2011, p12.
XV. See I. Gliga, *op. cit,* p116.
XVI. C. V. Neagoe, *op. cit,* p 82.

XVII. See Ș. Siclodi, *About causes that removes criminal response,* Revista Dreptul nr.2/1970, p 32.

XVIII. See B. Vîrjan, *op. cit,* p 345.

XIX. See in this matter Î.C.C.J, penal section, decission nr.163/17.01.2014,http://www.scj/1093/Detalii jurisprudență.

XX. Commission Regulation (EU) no 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, publ. OJ L 268 of October12th 2010; Directive 2010/24/EU of 16 of March 2010 concerning assistance for recovery of claims relating to taxes, duties and other measures, Publ. in OJ L 84 of 31of March 2010; Directive 2009/107/EU Council of 9th of December 1986 amending Directive 2010/16/EU as regards mandatory automatic exchange of information in the fiscal domain, Publ. in OJ L 359 of 16th of December 2014.

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