‘Triggering Persons’ in ‘*Ex Crimine*’ Liability of Legal Entities

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Abstract This analysis aims at identifying the position of the subjects who might be regarded as the perpetrators of a predicate offence that can be attributed to a legal entity (so called ‘triggering persons’).

My idea is to try to distinguish different member states’ legal systems on a scale drawing progressively away from ‘leading positions’, depending on the importance attached to the sole ‘top positions’ or also to the ‘subordinate positions’ or even to the unlawful types of conduct otherwise committed by a ‘third person’ external to the organization, in order to attribute liability ‘*ex crimine*’ to a legal entity for a predicate offence. This analysis will be developed regardless of further distinctions connected to the different framework of criminal, *quasi*-criminal or administrative liability of legal entities.

In the light of the contact points among the legal systems of EU member states, which arise from a comparative analysis, we shall also be able to draw common lines to develop this specific aspect of discipline. The goal is to propose a common regulation which may allow for the approximation and harmonization of member states’ legal systems in accordance with the fundamental ‘principle of personality’ of corporate criminal liability, even under the specific charging criterion connected to the ‘triggering person’.

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1 The Legal Systems of Member States Giving Relevance to the Sole 'Leading Position' of the Offender

My analysis shows that, with reference to the criteria used to identify the 'triggering person', the member states' legal systems may be grouped as follows.

Some member states' legal systems attach importance to the sole 'leading position' of the perpetrator of a predicate offence, as an organ or a representative of the legal entity's 'will'. They are centred on a 'pure' principle of identification, i.e. an 'organic' system to attribute liability to collective entities, wherein who holds a 'leading position' acts in the name of, and on behalf of, the entity because of his/her powers of 'organic representation', since the body corporate can only express its will through its 'organic representative' whom it therefore fully 'identifies itself' with.[1] We can detect this, for instance, in the following legal systems:

- in the United Kingdom, although only for *mens rea* offences, according to the identification principle. As known, case law identified the 'person in a leading position', i.e. the 'directing mind and will' of the body corporate, with its 'senior or controlling officers', who 'speak and act as the company' and so they identify themselves with the corporation[2];
- in France, at least according to the principles originally set in its criminal code, Article 121-2, which expressly refers to the '*organe ou représentant*', as an offender who can trigger liability for the collective entity if the offence is committed on its behalf ('*pour compte*')[3];
- in Luxembourg: Article 34 of the criminal code (as amended in 2010).[4]

My comparative analysis shows that an approach attaching importance to the unlawful types of conduct of the 'sole' subjects in a 'leading position' is now to be regarded as a charging criterion covering a limited number of cases. In the examined legal systems, indeed, there are significant trends to increase the number of subjects who may be perpetrator of a predicate offence, because a too selective choice of offenders as sole subjects in a 'leading position' led to a real evasion of corporate criminal liability, which is grounded on merely 'organic' or 'identification' criteria.[5]

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[1] In this regard, see Coffee (1999), pp. 15ff.; Wells (1999), pp. 219ff.

[2] In these terms, see Trapasso (2012), pp. 252ff., with further references.

[3] For more details on the developments of the notion of '*organe ou représentant*' in French literature and case law, see Tricot (2012a), pp. 151ff.

[4] The new legal provision set forth in Luxembourg's criminal code tends to burst the banks of French legal provision, though going along the same direction. It does not only refer to an organ, as a concept also including the legal representative, but it also refers to a top manager, both a *de iure* manager and a *de facto* manager ('*par un de ses organes légaux ou par un ou plusieurs de ses dirigeants de droit ou de fait*'), who committed a criminal offence in the name and in the interest ('*au nom et dans l'intérêt*') of a collective entity. The question concerning a real rooting '*du modèle* "*identificatoire*"' in Luxembourg's system is stressed in a problematic way by Tricot (2012b), pp. 406ff., which we refer to for any further examination.

[5] For critical remarks to the 'identification theory', see Gobert (2012), pp. 225ff.

This has paved the way to the progressive abandonment of a 'pure' identification principle in favour of systems of attribution of corporate liability which can be, at least potentially, also 'vicarious' or anyhow defined as 'mixed'.

2 Searching for Common Traits Within Member States' Legislation Attaching Importance to Unlawful Types of Conduct Both of Subjects Who Have a 'Leading Position' and 'Subordinates'

A second group of member states' legal systems can be singled out, which is likely to prevail. The common feature of these systems is represented by the relevance that is given to the unlawful types of conduct of both subjects in a 'leading position' and 'subordinates', if there was a breach of the duties of supervision of a subject in a 'leading position' over an 'employee'.

In our opinion this can be defined as a 'two-tier system', wherein a legal entity can be held liable for both cases: (a) in case a criminal offence is committed by a person in a 'leading position' (according to 'organic' principles); (b) in case an offence is committed by a 'subordinate', provided that there is an actual objective link with the corporation, which in most cases means a breach of the duties of supervision of a person in a 'leading position' over his/her 'employees' (according to principles based upon a 'vicarious' approach).

We should take into account that this system has some roots in EU provisions, going from the Second Protocol to the PIF Convention to the most recent instruments adopted by the European Institutions.[6] In our opinion, therefore, it may now be considered, at least *in nuce*, as a sort of 'European Union statutory model'.

These instruments prescribe that a legal entity can be held liable for offences committed 'for its benefit' by a person in a 'top position', i.e. who has a 'leading position' within the legal person, acting individually or as a part of one of its organs. It is interesting to point out that a person in a 'leading position' is singled out in relation to his/her powers, which are selected for their peculiar 'relevance'. In particular, he/she has at least one of the following powers:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the body corporate;
- an authority to exert control within the legal entity.

[6] We are making special reference here to Article 3 of the Second Protocol to the Convention on the protection of the European Communities' financial interests (PIF), adopted in 1997 and published in the Official Journal C221, 19.07.1997. The imputation pattern outlined in the second Protocol to the PIF Convention has been basically proposed again in the following years by several framework decisions and directives, which have been adopted to oblige member states to introduce corporate liability '*ex crimine*' to protect relevant EC properties, which needed to be safeguarded.

In the second case, instead, an unlawful act is committed by a 'subordinate', if the 'lack of supervision or control' by a person in a 'leading position' made it possible for a person under his/her authority to commit an offence 'for the benefit' of the legal person.

We can observe this 'two-tier system', for instance, in the following legal systems, wherein the relevant law provisions, which could be basically regarded as similar in their contents as to the identification of possible offenders, are somehow different in their wordings:

- in the Italian system, Article 5 of Legislative Decree No. 231/2001 gives relevance to both subjects in a 'leading position' and 'subordinates', i.e. those who are subject to the direction or supervision of a person in a 'top position', provided that a predicate offence is committed because of a breach of his/her duties of direction or supervision.[7] In particular, the legislator adopted a 'functional criterion', prescribing that subjects in a 'leading position' are holders of functions of representation, management or direction in a legal entity or in a single 'organizational unit' of the same body corporate, provided that it has financial and functional autonomy. Moreover, the legislator compares '*de iure* top positions' with '*de facto* top positions', prescribing that those who exert, even *de facto*, powers of management 'and' control over a legal entity can also be considered as subjects in a 'leading position';
- in the German legal system, § 30 of the *Ordnungswidrigkeitengesetz* (OWiG) seems to give relevance to the unlawful types of conduct of sole subjects in a 'leading position' identified through a title catalogue by the same § 30 OWiG.[8] It does not expressly refer to those who are under other subjects' authority, thus making the interpreter at first believe that the German system may be grounded upon 'pure organic' patterns to ascribe liability to a legal entity. However, a more careful analysis shows that in the German legal system the scope of corporate liability '*ex crimine*' is further extended to unlawful types of conduct committed by an 'employee'. This is due to the prevailing interpretation of § 130 OWiG, stating that an administrative wrongdoing of a person in a 'top position' is regarded as a predicate unlawful act upon which a fine can be imposed on the legal entity (pursuant to § 30 OWiG). In other words, the body corporate could also be 'punished' in case an 'employee' committed an unlawful—both criminal and administrative—act, whereas a person in a 'leading position' violated his/her duties to control him/her, because he/she failed to adopt supervisory measures to prevent the unlawful acts of the 'employees'[9];

[7] Fiorella (2006), p. 5103, underlined how the law should be interpreted as referred anyhow to 'quasi-leading positions' ('*para-apicali*'), in order to ensure the principle of personality of corporate liability '*ex crimine*'.

[8] For further details, see Böse (2011), pp. 234ff.

[9] In these terms, see Engelhart (2012), pp. 180ff., who clarifies that an offence committed by a low level employee can trigger corporate liability only if a person in a leading position is responsible for 'lack of supervision' over low level employee.

- in the Austrian system, § 3 of the *Verbandsverantwortlichkeitsgesetz* (VbVG) prescribes that a legal entity may be held liable for an offence committed by a subject in a 'leading position' ('*Entscheidungsträger*'), or by a subject who is under other persons' authority ('*Mitarbeiter*'), provided that an offence is committed because a subject in a 'leading position' omitted to adopt preventive measures against criminal offences, thus making it possible or facilitating its commission to a large extent.[10] The Austrian law typifies the subjects' titles (§ 2 VbVG), also giving relevance to the unlawful types of conduct of subjects *de facto* exerting a decisive influence over corporate management, although they do not have any formal title;
- in the Spanish legal system, Article 31-*bis* of the criminal code prescribes that a legal entity can be held liable for an offence committed by both its legal representatives and directors *de facto* or *de iure* ('*sus representantes legales y administradores de hecho o de derecho*') or by a 'subordinate', because of a 'lack of supervision' of the first over the second one ('*por no haberse ejercido sobre ellos el debido control*')[11];
- in the Portuguese system, Article 11 of the criminal code provides that a corporation can be held liable for an offence committed by a person in a 'top position', i.e. who has a 'leadership position' ('*posição de liderança*') with decision-making powers, or by a 'subordinate' because of a breach of the supervision duties of the first over the second one ('*em virtude de uma violação dos deveres de vigilância ou controlo que lhes incumbem*'). The Portuguese legislator is referring here to organs and representatives of the legal entity, including those who exert, even *de facto*, control powers over corporate activities.[12]

In brief—and also when discussing chances of approximation and harmonization of member states' legal systems—it can be pointed out that all of these legal systems, and others,[13] require that an offence be committed by a triggering person in a 'leading position' or by a 'subordinate' subject to the authority of a person in a 'top position', because of a breach of the supervision duties of the first over the

[10] In this regard, also for further details, see Stärker (2007), §§ 2 and 3.

[11] For further examination on this issue, see Nieto Martín (2012), pp. 190ff.

[12] Arroyo Zapatero (2012), pp. 116ff. See also Espinoza de los Monteros de la Parra (2012), pp. 223ff.

[13] In this perspective, we can point out that a 'two-tier system', which gives relevance to the unlawful types of conduct of both subjects in a 'leading position' and 'subordinates', despite some differences, can be detected in other member states' legal systems, such as, for instance, Bulgaria (Art. 83a of the Law on Administrative Offences and Sanctions), Czech Republic (Section 8 of the Act on Criminal Liability of Legal Persons and Proceedings against them), Finland (Section 2, Chapter 9, criminal code), Hungary (Section 2 of the Act CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law), Lithuania (Art. 20 criminal code), Poland (Art. 3 of the ALCE, Act on Liability of Collective Entities for Acts Prohibited under Penalty), Slovakia (Section 83a–b, criminal code) and Slovenia (Art. 4 of the ZOPOKD, Act on Liability of Legal Persons for Criminal Offences).

second one. Therefore the scope of offenders has been extended to cover 'employees', thus integrating 'organic' patterns with 'vicarious' ones.

3 The Legal Systems of Member States Giving Relevance to Unlawful Types of Conduct Carried Out by a 'Third Person' External to the Organization

Some of the above mentioned member states and others can be assembled in a third group of EU legal systems. This group attaches relevance even to offences committed by a 'third subject' outside the organization, whose unlawful acts may influence the same legal entity.

We believe that in some systems the trend to extend corporate liability '*ex crimine*' to a third person's unlawful conduct may also be due to international organizations. For example the OECD is calling for limiting the frequent use of 'intermediaries' (i.e. persons external to the organization) for committing offences, in practice ensuring impunity for the legal entity itself.[14]

With particular reference to the role of a 'third-triggering person' in the organization, there is a peculiar outline that I would like to develop: it concerns the link between a 'third subject' and a legal entity. With reference to this, I believe that we should further distinguish this third group of EU legal systems into two subgroups:

1. whether the 'third' is identified with a 'representative' of the legal entity, i.e. who acts on its mandate, which gives the agent the powers to act on behalf of and in the name of the legal entity itself;
2. or instead he/she is essentially identified with 'whoever' acts on behalf of, or for the benefit of, the corporation.

3.1 External 'Third Persons' as Representatives of the Legal Entity

In the first subgroup, we can mention, for instance:

[14] The described phenomenon is quite widespread in multinational companies committing offences abroad through 'intermediaries'. In order to limit these phenomena, the OECD has urged member states to recognize corporate liability '*ex crimine*' even if a criminal action is committed by a 'third person' on behalf of the same legal entity. It has also requested that the mechanisms to prevent criminal offences should be actually extended to the 'thirds', 'such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners ("business partners")': see Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009.

- in the Estonian system, § 14 of the criminal code (as amended in 2008) sets forth provisions for corporate liability for an offence committed by a 'competent representative' ('*pädeva esindaja*'). In the explanatory memorandum to the amendment law, it is specified that it is referred to all subjects who represent the legal entity's 'will', i.e. acting on its mandate, even though they are not necessarily corporate 'employees', but 'third subjects' external to the organization (i.e. contractual agents)[15];
- in the Lithuanian legal system, Article 20 of the Lithuanian criminal code, which extends corporate liability to the case of an offence committed by an 'authorized representative' ('*įgaliotas atstovas*'), provided that the offence has been caused by the lack of supervision or control over the agent's acts by a person in a 'leading position'[16];
- in some respects, in the French system. To this extent, we should mention a recent stance of French case law that has extended the notion of '*représentant*' to include a 'third agent', external to the organization. The French Supreme Court has upheld the conviction of a company for the commission of an offence by a 'third person', who acted as a 'representative' and who was not a salaried employee ('*agent commercial non salarié, lié par un contrat de mandat*'), on the assumption that he/she was given the power to represent the legal entity outside to undertake some transactions.[17]

The novelty is even clearer when we consider that both the French system, and the Estonian one before the 2008 reform, were centred on 'pure organic' imputation patterns. From this point of view, we believe that this development can be considered as strictly connected to some enforcement problems that have emerged in those systems where a too selective choice of offenders as sole subjects in a 'leading position' led to a real evasion of corporate criminal liability, especially in very large corporations or in legal entities with a decentralized structure.

These reflections bring us to the following conclusions: with a view to approximating member states' legislation, it has to be taken into account a substantial and progressive overcoming of a 'pure organic' imputation model in those EU systems,

[15] It is interesting to point out that the Estonian criminal code does not currently provide for corporate liability for offences committed by an 'employee' as a result of a breach of the duties of supervision or control by a person in a 'leading position', since it refers to 'a body, a member of a body, a senior official, or a competent representative'. For this reason some legal scholars and international organizations criticized, under this viewpoint, the Estonian system because its legislation would conflict with EU obligations. For further examination on this issue, see Valenzano (2012a), pp. 486ff.

[16] For more details, see Valenzano (2012a), pp. 494ff.

[17] We are referring to the judgment of the Supreme Court of Cassation (*Cour de Cassation, Chambre criminelle*) of 23 February 2010, No. 09-81819, available at http://www.juricaf.org (20.11.2013), which upheld a company's criminal conviction for the commission of an offence by an estate agent acting as a 'representative' of the corporation. For more details on this issue, see Tricot (2012a), pp. 154ff.

where relevance was first attached to the 'sole' unlawful types of conduct of subjects in a 'leading position'.

3.2 *External 'Third Persons' Acting on Behalf of, or for the Benefit of, the Corporation*

In the second mentioned subgroup, the 'third person' is basically identified with 'whoever', that is any natural person acting on behalf of, or for the benefit of, the legal entity.

In the legal systems we grouped under this subgroup the notion is mostly extended, since the 'third person' can trigger liability for the legal entity, although he/she has no specific mandate giving him/her the powers to represent the legal entity outside, i.e. even if he/she cannot act in the name of the corporate body because of his/her lack of power of attorney.

In this perspective, we could find a contact point between the following legal systems.

- In the United Kingdom:
  - on one hand, with reference to 'strict liability' offences, i.e. offences without *mens rea*, since a legal entity can be held liable for an unlawful type of conduct of a 'third person', thus applying 'agency' or 'vicarious liability' principles. In other words, if an offender carries on his/her activities within the control of a corporation, the same legal entity shall also be held liable for the unlawful acts committed by the 'third person' who is not an 'employee' but who acts on behalf of the body corporate (a so-called '*agent*')[18];
  - on the other hand, in the Bribery Act (2010), the legislator has stated that a bribery offence can be committed by an 'associated', i.e. a subject to be determined as 'a person who performs services'. This subject is identified with any natural or legal person who performs services 'for or on behalf' of the entity, apart from his/her capacity (Section 8 Bribery Act)[19];
- in Hungary, Section 2 of the Act CIV 2001 typifies the offenders by dividing subjects in a 'leading position' and 'employees'. It also provides for 'a third level' whereas an offence is committed by whoever, i.e. even by a subject outside the organization, provided that the body corporate has actually gained profits from the offence and a person in a 'leading position' knew it[20];

[18] In this respect, on the possibility that a 'principal-agent relationship' is enough to meet this requirement, without a 'master-servant relationship' between them, see Smith and Hogan (2008), p. 201.

[19] For further details on the notion of 'associated person', see Mongillo (2012), pp. 310ff.

[20] On this point, see Valenzano (2012b), pp. 528ff.

- in Belgium, Article 5 of the criminal code;
- and in the Netherlands, Article 51 of the criminal code.

In both cases it is not associated any difference with the subjective position of the 'triggering person'. It is made a general reference to a 'natural person', that is a '*personne physique*' (in the Belgian criminal code) and a '*natuurlijke personen*' (in the criminal code of the Netherlands).

This notion is widely extended in the Belgian system, since it makes reference to any natural person other than a corporate organ, its legal representative, its agent or its employee, who committed an offence 'on behalf' of the entity.[21] These principles are in accordance with the results of the Netherlands' case law, stating that a legal entity can be held liable for offences committed by 'any person' acting in its name or for its benefit.[22]

In brief, in the legal systems we grouped under this subgroup an offence may be attributed to a legal entity, under different conditions, if it is committed by a person in a 'leading position' or by an 'employee' or by a 'third person' external to the organization without the legal entity's previous assignment of the powers to represent it.

4 Concluding Remarks. Perspectives on Approximation and Harmonization of Member States' Legal Systems

In conclusion, even with a view to discussing chances of approximation and harmonization of member states' legal systems, my research leads to the following results.

4.1 'Common Ground': Offences Committed by a Person in a 'Leading Position'

A 'common ground' to approximate and harmonize EU legal systems can be identified by the fact that member states' legislation share common principles when they hold a corporation liable for an offence committed by a person in a 'leading position', although each national legal system has its own further criteria to link an offence to a legal entity.

As for the criteria chosen to identify 'leading' or 'top' positions, my comparative analysis has shown that the criterion of 'relevance' of a position can be reconstructed in member states' legal systems: (a) because a person in a 'leading

[21] For further examination on this issue, see Verstraeten and Franssen (2012), p. 268.

[22] In these terms, also for an analysis on the further charging criteria, see Tricot (2012b), pp. 377ff.

position' represents the legal entity; or (b) because the powers assigned to a person in a 'top position' are 'considerable'.[23]

4.2 *Why Not Any 'Employee' Should Trigger Corporate Liability* 'Ex Crimine'

With reference to the other position, that is a subject who is 'under the authority' of a person in a 'leading position', our comparative analysis has shown that legal scholars and case law do not pay any special attention to limit the number of subjects within this category, except for some cases. Therefore it is allowed to go down along the hierarchical scale, considering that 'any' hierarchical or functional link to connect the position of an 'employee' to a legal entity is required in several legal systems.[24]

In spite of this, and also in view of discussing chances of approximation and harmonization of member states' legal systems, we believe that it is essential to ensure in any case a real 'connection' between a 'triggering person' and the corporation in relation to the 'subjective position', which should express the legal entity's 'will'. As a result, it should be ensured that the criterion of 'relevance' of a 'subjective position'—i.e. a position is to be linked to the exercise of 'considerable powers'—should be applied, in order to guarantee a link of 'real belonging' between an offence and a legal entity. Therefore these subjects should be in a position closely resembling to a 'top position', which we could define as a 'quasi-leading position'. It means that they should be placed 'just below' top persons or in a very similar position with respect to their functions.

4.3 *Why Not Any 'Third Person' Should Trigger Corporate Liability* 'Ex Crimine'

As for the other category of subjects whose unlawful type of conduct may in abstract trigger corporate criminal liability, as already said, some legal systems acknowledge, under different conditions, that a legal entity is held liable for offences committed by a 'third person' outside the organization, although he/she does not formally belong to the body corporate. In some legal systems the legal entity is held liable for offences committed by 'any natural person' without any distinction.

In my opinion the problem is that in this case there is a high risk to violate the 'principle of personality' to attribute corporate criminal liability, because the 'link

[23] For further analysis on this issue, see Valenzano (2012c), pp. 242ff.

[24] In this regard, see Tiedemann (2012), pp. 4ff.

of real belonging', which grounds the legal entity's 'own' and 'personal' liability, may not be guaranteed. Therefore, to avoid this risk, we should make it clear that a corporation should be held liable for an offence committed by 'a third person', only if the latter received a 'specific mandate' to represent the legal entity's 'will' outside to carry out certain operations, even by acting in its name.

In other words, although a person is placed outside the organization, a body corporate should be equally held liable for his/her unlawful conduct, only if the 'third person' are given 'considerable powers', i.e. he/she exerts 'considerable powers' which are comparable to the powers exerted by a person in a 'top position' o in a '*quasi*-leading' position. In my opinion, this represents an important safety valve that may guarantee against the risk of breaching the 'principle of personality' of corporate criminal liability and may therefore allow for the approximation and harmonization of member states' legal systems in accordance with this fundamental principle.

4.4 Proposal for a Common Regulation

I had the honour to participate, as a researcher, in a 3-year research project financed by the European Commission, devoted to 'Corporate Criminal Liability and Compliance Programs' (JLS/2008/JPEN/009), carried out by Roma Tre University,[25] Sapienza University of Rome,[26] Panthéon-Sorbonne University of Paris[27] and Castilla-La Mancha University.[28]

At the end of the research, in September 2012, we proposed the following rule to the EU Institutions, with a view to approximating and harmonizing member states' legal systems: "*Principle of personality and criteria for charging a legal person*. Member states shall set forth provisions stating that legal persons can be held liable for the offences committed to pursue their interest by:

a) persons who perform a leading function, even *de facto*, in the body corporate, by virtue of their powers of representation, decision or control;
b) other subjects who perform a considerable function, even *de facto*, and those subject to the direction or supervision of a person referred to in point a);
c) persons acting on specific mandate of the legal entity, exerting powers which can be referred to the functions provided for in points a) and b);

[25] Roma Tre University research unit was headed by Prof. A. Fiorella and Prof. A. Maresca.

[26] Sapienza University unit was directed by Prof. A.M. Stile.

[27] Panthéon-Sorbonne University unit was managed by Prof. S. Manacorda and Prof. G. Giudicelli-Delage.

[28] The Spanish Castilla-La Mancha University unit was conducted by Prof. L. Arroyo Zapatero and Prof. A. Nieto Martín.

d) subjects who perform the above mentioned functions in an organizational unit of the legal entity, provided that it has financial and functional autonomy".[29]

This rule, in my opinion, may allow for the approximation and harmonization of member states' legal systems in accordance with the fundamental 'principle of personality' of corporate criminal liability, even under the specific charging criterion connected to the 'triggering person'.

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[29] This is an excerpt from Paragraph 6 of the "Guidelines on Liability '*ex crimine*' of Legal Entities in EU Member States", in Fiorella (2013), p. 441.

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