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**LEGAL STATUS OF INDEPENDENT REGULATORY AUTHORITIES
IN UKRAINE AND SWEDEN: COMPARATIVE ANALYSIS
ПРАВОВИЙ СТАТУС НЕЗАЛЕЖНИХ РЕГУЛЯТОРНИХ ОРГАНІВ В
УКРАЇНІ ТА ШВЕЦІЇ: ПОРІВНЯЛЬНИЙ АНАЛІЗ
ПРАВОВОЙ СТАТУС НЕЗАВИСИМЫХ РЕГУЛЯТОРНЫХ
ОРГАНОВ В УКРАИНЕ И ШВЕЦИИ: СРАВНИТЕЛЬНЫЙ АНАЛИЗ**

***Summary.** This article outlines the legal status of the independent regulatory authorities in Ukraine and Sweden. Peculiarities that distinguish those authorities are investigated with the aim to show the reasons why they are having a special role in the structure of public administration. At the same time, the biggest attention is devoted to determination of the main features of Ukrainian and Swedish independent regulatory authorities systems. Basing on those features, a comparison of both systems is made. This comparison is quite interesting from the doctrinal point of view and definitely deserves attention, because countries that have been chosen for this analysis are characterized as*

those, whose systems of independent regulatory authorities are completely opposite (for example, Swedish system is considered as one of the oldest and Ukrainian is still in the process of its formation) and, at the same time, they have numerous similarities that are in details described in this article.

To accomplish the research by giving a deep analysis of the outlined issue and successfully achieve formulated objectives, this article blueprints a general picture of legal status of independent regulatory authorities in Ukraine and Sweden and compares them. It has to be made clear that in order not to make this work too descriptive, but more analytical, the author is paying attention to the issues that have been revealed during the process of the topic research, outlining them in a conclusive manner to show a general picture of the existing situation, rather than only cite and describe the legislative provisions. Basing on the results that have been achieved during this research, conclusion part generalizes the whole information and detects the nowadays challenges that systems of independent regulatory authorities in both countries are facing.

Key words: *independent regulatory authorities, state collegial authorities, national regulatory commissions, agencies.*

Анотація. *Стаття висвітлює проблему правового статусу незалежних регуляторних органів в Україні та Швеції. У статті наводяться особливості, що відрізняють цю групу органів публічного адміністрування від інших, з метою показати у чому саме полягають причини надання їм окремого місця у загальній системі адміністративних органів. Чи не найбільша увага приділяється визначенню основних рис незалежних регуляторних органів в Україні та Швеції, на основі чого здійснюється порівняння правового статусу незалежних регуляторних органів в цих країнах. Таке порівняння є цікавим з теоретичної точки зору і заслуговує на увагу як з боку науковців, так і практиків, адже країни обрані для цього порівняльного дослідження на перший погляд можуть*

здатися абсолютно протилежними за своєю адміністративно-правовою організацією (наприклад, шведська система органів публічного адміністрування вважається однією з найдавніших в Європі, в той час як українська ще досі перебуває в стані свого розвитку та формування), водночас, системи органів публічної адміністрації у країнах, які є об'єктом цього дослідження, мають ряд спільних рис, які детально описуються у статті.

Стаття ілюструє якісне та глибоке дослідження окресленої проблематики, визначаючи загальні риси правового статусу незалежних регуляторних органів в Україні та Швеції та здійснюючи їх порівняння. З метою максимального уникнення описовості, автор зосереджується на висвітленні аналітичних результатів дослідження та формуванні практичних висновків і рекомендацій. Заключна частина статті визначає виклики, з якими стикаються незалежні регуляторні органи в Україні та Швеції в сучасних умовах, та пропонує шляхи їх ефективного подолання.

Ключові слова: незалежні регуляторні органи, державні колегіальні органи, національні регуляторні комісії, агенції.

Аннотація. Стаття освещает проблему правового статуса независимых регуляторных органов в Украине и Швеции. В статье приводятся особенности, отличающие эту группу органов публичного администрирования от других, с целью показать в чем именно заключаются причины предоставления им отдельного места в общей системе административных органов. Особое внимание уделяется определению основных черт независимых регуляторных органов в Украине и Швеции, основываясь на этом осуществляется сравнение правового статуса независимых регуляторных органов в этих странах. Такое сравнение является интересным с теоретической точки зрения и заслуживает внимания как со стороны ученых, так и практиков, ведь

страны выбраны для этого сравнительного исследования на первый взгляд могут показаться совершенно противоположными (например, шведская система органов публичного администрирования считается одной из древнейших в Европе, в то время как украинская до сих пор находится в состоянии своего развития и формирования), но в то же время системы органов публичной администрации в странах, которые являются объектом этого исследования, имеют ряд общих черт, которые подробно описываются в статье.

Статья иллюстрирует качественное и глубокое исследование сформулированной проблематики, определяя общие черты правового статуса независимых регуляторных органов в Украине и Швеции и осуществляя их сравнения. С целью максимального предотвращения описательности, автор сосредоточивается на освещении аналитических результатов исследования и формировании практических выводов и рекомендаций. Заключительная часть статьи определяет вызовы, с которыми сталкиваются независимые регуляторные органы в Украине и Швеции в современных условиях, и предлагает пути их эффективного преодоления.

Ключевые слова: *независимые регуляторные органы, государственные коллегиальные органы, национальные регуляторные комиссии, агентства.*

Relevance of the researched problem. This article is mainly focused on the research of the features, legal nature and status of the Independent Regulatory Authorities (hereafter - IRA). The relevance and importance of IRA research is almost obvious. First, because the phenomenon of the IRA is certainly not new, but it seems to have increased and became more popular in recent years [4, p. 5]. A wave of 'agencification' (establishing an independent from three branches of powers regulatory bodies) is sweeping across the

Western world. Initiatives that have been presented under this heading are 'The Next Steps Initiative' in the UK, *agentschappen* in the Netherlands, and scattered examples in the US, Australia and Japan. The transition states in Eastern Europe and a number of developing countries have also made attempts to create autonomous administrative bodies [10, p. 5]. Even the EU has followed the trend of a creation of IRA [21, p. 615-635]. Second, according to the fact that IRA aims are: increased efficiency, strengthened and clarified responsibility lines, a more encouraged and professional administration, and a more service oriented administration placed closer to citizens [12, p. 108-111], it means that their expansion, establishment and development are crucially important for the states, especially those which are facing some difficulties in effective regulation, as Ukraine. It is essential to explain why such countries as Sweden and Ukraine are the subjects of this research. Sweden ought to be an interesting case for the comparative analysis regarding IRA with Ukraine. The arguments for this are numerous, the most significant ones will be outlined further. In Sweden practically all public services are performed by agencies enjoying considerable autonomy. And noticeably, regarding the fundamental administrative format Sweden has not followed in the footsteps of the UK. Actually, it is the other way around – the UK is treading in the footsteps of Sweden [21, p. 615-635]. The path it is walking is rather long, as Swedish state agencies have been distinctively separated from the core executive for almost 300 years. So, if there are experiences to gain and lessons to learn about how politicians govern autonomous agencies, and how the conditions for governing have changed in recent years, it seems like a good idea to search for them in Sweden [4, p. 7]. Moreover, the fact that Sweden is a well-known 'cradle-to-grave' *welfare state* [8, p. 39], left no doubts that the Swedish system of public administration in general, and IRA in particular, is functioning well and giving positive results. So, it is worth to explore all peculiarities of Swedish IRA, compare them with

Ukrainian and point out some features that might be useful for being transposed to Ukrainian system of IRA to make it more efficient.

Level of scientific research. While outlining the level of scientific research of the analyzed issue of this article in global scale, such famous worldwide researchers of the Administrative law as: A. Burns [2], B. Jacobsson [4], R. Wettenhall [21] have to be mentioned. They have analyzed general theoretical issues of the IRA. Legal position of IRA in the system of public administration in Ukraine has been analyzed in works of the following Ukrainian scientists: V. Averianov [1], R. Melnyk [9], Y. Vashchenko [18]. However, level of scientific research of Ukrainian IRA in comparison with IRA in other countries, including Sweden, is not so developed either in Ukraine or even worldwide. Due to the fact that Ukraine is not a Member State of the European Union (hereafter – EU), it is not popular among European scientists to research Ukrainian administrative law issues and Ukrainian IRA in particular. At the same time, research of Ukrainian IRA’s legal nature comparatively to other countries is in high relevance today, because basing on this research some influential recommendations could be made, which will help to ensure progress in the development of Ukrainian public administration system.

Objectives of the article. The main objectives of this work are to: outline the legal status of IRA in Ukraine and Sweden; make a comparative analysis between the legal statuses of Ukrainian and Swedish IRA; detect existing legal problems in the legal statuses of IRA in both countries.

Presentation of the article’s main material.

Legal status of IRA in Ukraine. The event of gaining a status of an independent state, at first, seemed to be a significant achievement and victory for Ukrainians as they struggled for this during centuries. However, becoming independent has meant that in order to make this country function as it should, a lot of things have to be done at the beginning, such as: the Constitution and basic legislation have to be adopted; political system and regime, system of state

government have to be decided. Moreover, all this tasks have to be finished as soon as possible to avoid a situation of disorder and lawlessness in the country.

Ukrainian statesmen, politicians and scientists decided on to take the easiest way and used the constitutions and principles of the most developed democratic countries as well as classical principles and theories of state building as the examples while drafting their own constitution. That is why a doctrine of separation of powers [2, p. 565-607] and 'checks and balances' [14, p. 60] mechanism are fundamental grounds of Ukrainian Constitution. Article 6 of the Constitution of Ukraine sufficiently precise stipulates: 'the power in Ukraine is exercised on the basis of its separation into legislative, executive, and judicial power' [3]. There is no need to prove that according to the doctrine of the separation of powers, the main state functions are among the executive branch competences. Despite a significant role of executive branch should not be underestimated, it also has to be mentioned that some of the executive functions are carried out by the public authorities which do not belong to this branch of power. The reason of this is that nowadays state encounters the need to fulfill many different functions in a comprehensive variety of fields. This situation logically lead to the establishment of completely new bodies, organizations, agencies which are entitled with a lot of peculiarities that distinguish them from the 'classical' public authorities that can easily be defined as those belonging to one of the branches of power. Consequently, 'the pure separation of powers seems to be desirable, but not possible model of a modern governmental organization' [19, p. 60], particularly what concerns Ukraine.

So, being more focused on the executive branch, it could be said that till the recent time the most prominent scholars of the Administrative law of Ukraine adhered the following position: 'public administration is formed by executive authorities and local governments' [1, p. 117-122]. However, after the administrative reform of 2014, the situation has changed. As Melnyk points out: 'under the present conditions, public functions can also be performed by public-

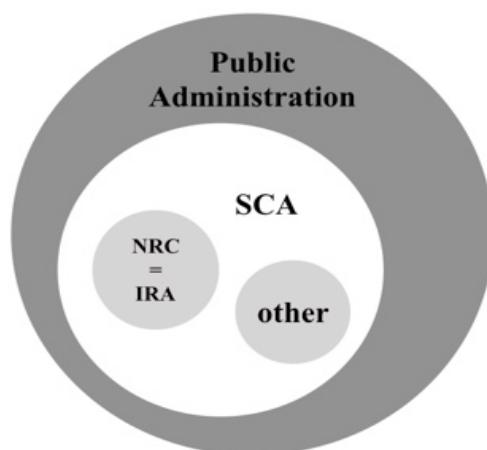
law enterprises, institutions, public-law foundations, as well as subjects of delegated powers' [9, p. 8]. Furthermore, the group of so-called IRA has been formed, rapidly developed and extended. The most significant feature of the IRA is that they combine functions of all traditional branches of power (such called 'quasi-legislative', 'quasi-executive', 'quasi-judicial') [16, p. 36]. In addition, legal status of the IRA and their place in the system of public authorities in Ukraine is still in the process of formation. These regulatory authorities are outside the framework in Ukraine since the Constitution of Ukraine does not define such type of state bodies [19, p. 63]. Despite this fact, they not only exist, but are also important actors in the arena of the enforcement of state policy in certain fields where special regulation is needed.

Before describing the legal nature, main functions and features of the IRA in Ukraine, it is rationally to make a brief historical overview of the evolutionary process of their formation in the system of public authorities.

Generally speaking, the system of executive bodies in Ukraine could be characterized as rather difficult and it is tend to be changed or reformed easily. The explanation for this is that according to the Constitution of Ukraine the system of executive bodies is a three-tier, which consists of: the Cabinet of Ministers of Ukraine as the highest body of the system; ministries and other central executive bodies; local executive bodies. The constitutional formulation of the central level of the executive system as 'ministries and other central bodies of executive power' is vague and ambiguous, which gives to the legislator a place of maneuver and an opportunity to interpret 'central bodies of executive power' in a beneficial way for them, adding to this category bodies that do not fulfill the necessary criteria to be there. Moreover, the category of the 'other central bodies of executive power' has been expanded and the category of 'central bodies of executive power with special status' has been created [7]. At the same time, the criteria for authority to be called a 'central body of executive power with special status' have not being defined in the legislation. This led to

the situation when to the category of 'central bodies of executive power with special status', at different periods of time, have been included: state authorities such as the Security Service of Ukraine, *national regulatory commissions* (hereafter - NRC), which, due to their peculiarities, could not belong to any of the branches of powers; constitutional bodies that are not part of executive authorities, but which status, establishment and main objectives are defined in the Constitution of Ukraine (Antimonopoly Committee of Ukraine, State Property Fund of Ukraine, Central Election Commission); authorities with features of classical executive bodies, but which due to certain subjective reasons have been withdrawn from the direct subordination of the government and added to this category [20, p. 137-138]. It is clear from the above sentence that the NRC used to belong to the 'central bodies of executive power with special status', although, now these bodies have the status of the *state collegial authorities* (hereafter - SCA) and are not included to the system of executive bodies. Trying to simplify this structure, it could be said that among Ukrainian public administration the SCA as a group of authorities could be separated. However, this group itself is also not uniform, because all of the bodies that belong to it could be divided into the NRC that conduct state regulation in the certain field of economics and could basically be called the *independent regulatory authorities* and those bodies, on the other hand, that despite having a status of *state collegial authorities* cannot be considered as an independent authorities. The example of the second group is the Accounting Chamber, which has the status of SCA, but is not an independent as the Law 'On Accounting chamber' prescribes that this authority is accountable to the Verkhovna Rada of Ukraine and shall inform it about the results of its activity on a regular basis [19, p. 63].

Correlations between the SCA, NRC and other bodies that are not independent could be better understood with the help of the graphical illustration proposed below (look at graph 1).



Graph 1: Place of IRA in the Public Administration System of Ukraine

After outlining the place of IRA in the public administration system of Ukraine, it could be proceeded to the description of their main features and aspects. Ukrainian researchers usually define the following three aspects of regulatory independence: the independence from the government, the independence from the regulated industries, and the independence in decision making [17, p. 187]. What concerns the main features of IRA, they are the following: special competence; peculiarities of relationships with the highest body in the system of executive power - the Cabinet of Ministers of Ukraine; the peculiarities in the procedure of formation, reorganization and liquidation of these authorities; the special way of appointment and dismissal of the heads of these bodies [20, p. 138]. The biggest attention should be given to the feature of special competences. The reason of this is the fact that this particular feature became the driving force of the process of establishing and separation of IRA from all the others public authorities in Ukraine. The special competences in the energy sector are maintained by such IRA as: National Energy and Utilities Regulatory Commission. This Commission gained the status of IRA primarily because Ukraine as a member of the Energy Community shall guarantee the independence of its national regulatory authorities in the energy sector in accordance with the EU requirements, primarily the Electricity and Gas

Directives [18, p. 1235]. Other examples of Ukrainian IRA are National Connection and Informatization Regulatory Commission, National Securities and Stock Market Commission, which also became independent authorities because they regulate the special relations in the economics field.

Finishing this part of the article, it could be stated that the status of IRA in Ukraine is very similar to the status of the central banks as The National Bank of Ukraine is a special central body of public governance, which is aimed to fulfill certain obligations in the financial and budgetary spheres and could not be related to any of the branches of power [6].

Legal status of IRA in Sweden. Swedish IRA, which are also known and frequently called agencies, have already a long history of existence. Being more precise, it is almost four-century long tradition of independent agencies, as well as a long tradition of local autonomy formalized in the second half of the 19th century, but going back far longer than that [10, p. 5]. Traditionally Swedish agencies have had a high level of organizational and policy autonomy, an autonomy protected by the constitution [4, p. 9]. This lead to the establishment of specific model of 'dualism' in Swedish public administration, which dates back to the 1809 Constitution [5, p. 489-525]. The term 'dualism' signifies that there are clear demarcations between the political ministries and the non-political agencies and this separation is enshrined in the constitutional level [8, p. 41]. The core element of this dualistic model is a combination of an extremely small Government Office (ministries), compared to ministries in most other countries [8, p. 41], and a large number of IRA. There is a rational grain in the way this model is structured as well as the reasonable explanation why the quantity of IRA is a comparatively large in Sweden - it is simply because they are regulating most of the process in the state. In other words, system of Swedish IRA is so numerical and expanded, because Swedish IRA are doing much of the work that in many other countries is performed in ministries. This system is efficient due to the forceful principles and methods by which it is

governed. Thus, organizational structure of the typical Swedish IRA is its own internal matter. According to the general framework set up in the ordinances, it is up to the Director General how to structure the agency. Likewise, personnel matters are regulated in law but typically on a very general level, and there has in recent years been a move toward reducing differences between the private and public sector with respect to labor affairs. The civil servant is increasingly seen as an employee like any other and traditional bureaucratic practices such as lifetime guaranteed employment have essentially been phased out [5, p. 489]. The emphasize has also to be made on the ban on '*ministerial rule*' as a key principle of Swedish IRA system. This principle precludes the intervention of policy organs in agency decisions concerning single individuals or legal personalities [10, p. 5]. At the same time, having the system of a strict separation between the ministerial and IRA affairs, there is also a good balance and proportional divided influences between them. For example, Government ministers are allowed to exercise general control over the independent agencies under their jurisdiction; they are just not permitted to interfere in matters pertaining to specific cases or decisions concerning individuals, municipalities, or county councils (ban on '*ministerial rule*'). Other instruments of influences on the IRA that Government have include: the right to appoint heads of agencies and the use of informal contacts between political appointees in the ministries and agency personnel [8, p. 42]. However, it should be added that the dualism has taken on a certain degree of sacredness in Sweden as for a long time it was a most delicate thing for politicians to contact agencies at all, and it was possible for executives in agencies not to talk to and inform ministers about their activities [10, p. 5]. Interestingly, while there are several instruments available to Government ministers and their politically appointed staff to govern the general direction of the agencies' work, the average Swedish civil servant retains a degree autonomy that is unusual if not unique by international standards. One survey of top-level management at 182 Swedish administrative

agencies strongly suggests that this autonomy is by and large respected. 86% of respondent stated that the ministry under which they sorted placed 'no' restrictions or only 'very minor' restrictions on how they manage their daily work and prioritize between activities. 13% of the managers said that there were 'consultations' with and 'some restrictions' set by, the ministry, whereas only 1% claimed that the 'ministry takes most decisions' [11, p. 891-907].

It could be summarized saying that the dualism of the Swedish system is unique on an international comparison, for while many countries have moved toward granting the administrative bodies greater autonomy [13, p. 305-313], nowhere else the prohibition against trying to influence how an agency handles a specific case is so serious and strict.

Comparative analysis of IRA in Ukraine and Sweden. Comparison between the IRA systems of Ukraine and Sweden has to be started with the feature that differ those systems the most. Well, while Sweden has very general rules which apply to all of the independent agencies equally, not distinguishing any of them, in Ukraine system works differently, meaning that the rules can differ depending on what authority it is and in which field it is acting as an independent regulator. For instance, regarding the energy regulators, such as National Energy and Utilities Regulatory Commission rules of appointment and dismissal procedure of its heads [15] are different, let's say 'more independent', compare to the National Connection and Informatization Regulatory Commission or other IRA. This does not necessarily mean that it is a prone or con of Ukrainian IRA, it is just its peculiarity, which is based on many other preferably specific only to Ukrainian realities factors. The purpose of outlining this feature, is to show that the system of IRA is highly dependable on the mentality and traditions that exist inside this country. The proof of this is the next peculiarity that makes Ukrainian and Swedish IRA systems different. It is such an important distinguishing characteristic of Swedish administrative agencies as their openness and accountability. It cannot be stipulated that

Ukrainian IRA do not obey the transparency and public access to documents rules, but in comparison with Swedish agencies for which 'culture' of openness is traditionally typical, the level of Ukrainian IRA openness is rather acceptable and not even a satisfactory. The same grounds have the following distinguishing feature. While for the Swedish ministries it is mentally unusual not to interfere in the private affairs of the agencies, because they are used to the principle of subsidiarity and soft form of government, on the other hand, Ukrainian government has traditionally a position of being in charge of everything as well as having a possibility of influence on the every authority (which also historically came from the Soviet Union times). So, that is why for Ukraine it is more complicated and time-consuming to rebuild and completely change the whole system of public administration. So, the procedure of separation IRA from three branches of powers and make them fully independent is demanding, as it requires combating all of the possible influences.

Coming to the similarities between IRA systems of Sweden and Ukraine, it could be pointed out, that even though Sweden is parliamentary country and Ukraine – semi-presidential, there are still likenesses between their IRA systems. For example: existence of IRA which are separated from all the others administrative bodies because of significance of their competences; special rules regarding the appointment and dismissal of heads of IRA; independent financialization prescribed separately in the system of budget distribution. Similarities that Swedish and Ukrainian IRA share are quite general. This allows systems of IRA in both countries remain unique.

Interesting feature of Swedish IRA system that gives it uniqueness – is a high degree of trust, both between fellow citizens and toward government institutions. Arguably, this trust helps ensure effective and stable institutions of public administration and makes it possible for the central government to allow high degrees of administrative autonomy, public insight and accountability, and decentralization without fearing a debilitating loss of control [8, p. 45]. There is

no doubt, the Swedish public administrative tradition constitutes successful experiment in how a strong central government can allow decentralization, administrative autonomy, and openness [8, p. 45]. For Ukraine, as a country interested in reforming its own public administration system, it may be worth taking a closer look at the model of Swedish IRA organization.

Conclusions and recommendations. As it was illustrated in the main part of the article, Sweden is the country with a well-developed and historically evolved system of IRA. Speaking about the tools how it managed to strike a balance between autonomy and control, three factors have to be taken into account, such as: ministers do never dictate the IRA what measures to take and what goals they are supposed to achieve – all these is in the hands of particular IRA; ministers do not act in the areas of IRA competences and do not interfere into their day-to-day work; relations between ministries and IRA are based on trust and responsiveness as the ministries are responsive to agencies requests and, at the same time, agencies are trying to do their best to satisfy with their work all the desires of the ministries. What concerns Ukrainian IRA system, it is quite modern and newly established. The distinguishing features of today’s IRA in Ukraine are their unclear legal status in the legislation and administrative law doctrine; absence of clearly formulated criteria for the authority to be called IRA; different level of independency between different IRA, which mainly depends on the function or field of competences that particular IRA has. All of the above mentioned features of Ukrainian IRA might seem to be negative, however, from a different angle of view, they are opening for Ukraine gates to the opportunity of adoption new and the most progressive tendencies in the system of IRA. For instance, main functional principles of Swedish IRA system have been developed over the years, more than three centuries have passed before this system started to work as harmoniously as it does now. And even nowadays Swedish IRA encounter some new challenges, because the process of internationalization, medialization, managerialization and europeanization of state

are taking place throughout the world. Ukrainian young system of IRA has a huge preponderance in this aspect as being still in the process of formalization, it can easily adjust to the challenges of the modern society. Moreover, as the strength points of different systems of IRA, especially Swedish one, are already known, this gives a Ukrainian legislator chance to choose the most suitable ones (for example, ban of 'ministerial rule', or reducing differences between the private and public sector with respect to labor affairs in the system of IRA) and transpose into Ukrainian IRA system. At the same time, while it may be easy to adopt new law establishing new principle of IRA activity, it is not one hundred percent guaranteed that this new rule will be effective in another country which has a completely different cultural, historical environment and mentality. That is why some of the IRA features are inherent for Swedish system and others - for Ukrainian. It could be concluded that both of the IRA systems of the countries that are subjects of this article are unique and interesting. Swedish system of IRA is old, in details prescribed by the law, cases and customs, based on the values typical for the Swedish society, such as transparency, openness, accountability and trust. Ukrainian system of IRA is young, still in process of its formation, focused on the individual approach to every single authority. There are advantages and disadvantages in both of them, but only the one who will be fearless to the modernization, quick in making changes and adjustments that new society demand, could manage to satisfy citizens needs and successfully overcome the challenges of modern world.

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