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# Germany III: Context and History

Compiled and ordered notes from interviews including cross-checks with publicly accessible material, prepared for future use. Language checks thanks to Andrew Simpasa SJ.

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## 1 Country information for Germany and Bavaria

### 1.1 Germany

Germany is located in the heart of Europe. With ca. 357,000 km<sup>2</sup> and ca. 80 million inhabitants, it is one of the largest and the most populous countries of Europe. It is one of the 28 members of the European Union, one of the 19 members of the Eurozone-Area, sharing in a common currency, and one of the 26 states making up the Schengen Area, within which movement without borders is possible for those who are entitled to do so. The capital, Berlin, is located in the North East, not far from the Polish border, and has about 3.3 million inhabitants. Other cities with more than 1 million inhabitants are Hamburg, Cologne and finally, the capital of Bavaria, Munich.

Germany is known to be Europe's economic powerhouse, its manufacturing industry and products famous worldwide. Prominent economic sectors are manufacturing, especially cars and machinery. Germany still ranks high as a country of research and development and is famous for its public education and universities. Germany is also among the world's most popular tourist destinations, due to both its scenic diversity and the beauty of its cities and historic monuments.

The first challenge for Germany is that, given its level of production and output, the country needs to import many resources and materials. This includes fuel and energy, even though there is new determination to decrease this dependence by pushing the production of regenerative energy. A second challenge is demographic development. For years, the fertility rate of Germany has been one of the lowest in the world, creating problems in the foreseeable future for the country's system of social solidarity and security. One option to deal with

emerging straits is immigration, which is why the number and size of non-German residents is growing.

Germany in its present constitutional, legal and economic forms underwent two major phases of development. The first started with the end of World War II, when the four victorious allied powers divided Germany into four occupied zones. From the three western zones emerged in 1948/1949 the Federal Republic of Germany, from the eastern zone the German Democratic Republic. The second phase was the downfall of the Berlin Wall and the border between the western and eastern parts of Germany in 1989 and the subsequent German re-unification. However, since the German Democratic Republic “accessed” the Federal Republic of Germany, the latter is of more interest for understanding the makeup and functioning of Germany.

One of the major reasons behind the present composition of Germany was the idea of the victorious allied powers to “compose” a German state in which no state as such has a dominant and centralistic role as Prussia had in the previous German Empire. For that reason, new borders were drawn and German eventually became a federal state, consisting of 16 states or *Länder*. Among those states, only very few retained their historic border and size, for example the north German “city states” Hamburg and Bremen, or the territorial states Saxony and Bavaria. Bavaria is, together with Baden-Württemberg, among Germanys most prosperous regions.

## 1.2 Bavaria

Bavaria has been registering high economic and social growth as manifested by various socio-economic indicators. Since 1990, the number of citizens increased ca. 1.6 million. From 2003-2013 the number of large business companies and corporations increased by 6,906 to 37,067, of middle-sized companies by 12,760 to 158,054 and of small businesses by 22,006 to 211,882.

Regarding businesses, there is also an increase in complexity: Bavaria has a comparatively high share of exports: 52% of what is produced in Bavaria is exported and sold abroad. ‘Companies in Bavaria in 2013 once again set a new record in foreign trade. The value of goods exported amounted to nearly 168 billion euros - that is 2% more than the previous year. Of German exports overall, 15.3% originated in Bavaria. Overall trading volume also set a new record, totalling 313.9 billion euros.’<sup>1</sup>

## 2 Language observation

In German, taxes are called “Steuern”, originating in the old medieval word *stiura* (support, assistance). The word “Steuern” has a double meaning: Besides “taxes” it also denotes “directing”, which is often used in public debate when taxes or levies are asked for to make activities, which (supposedly) damage the environment or economy, more expensive and therefore unattractive – for example a levy on CO<sub>2</sub> or the Financial Transaction Tax which puts costs on High Frequency Trading. This is close to the idea of a “Pigovian-Tax”, whose primary purpose is not generating income, but making damaging behaviour unattractive, i.e. if the tax achieves its purpose, it does no longer generate income.<sup>2</sup>

<sup>1</sup> Brochure „Bavarias Foreign Trade“ 2014, published by the Bavarian State Ministry for Economics and the *ihk*. Retrieved from <http://www.auwi-bayern.de/awp/inhalte/Arbeitshilfen/Bayern-Statistik.html>; and Bayerns Exportquote auf Allzeithoch. (2014, July 28). In: Bayerischer Rundfunk. Retrieved from <http://www.br.de/nachrichten/industrievericht-bayern-wirtschaft-100.html>

<sup>2</sup> Cf. [http://en.wikipedia.org/wiki/Pigovian\\_tax](http://en.wikipedia.org/wiki/Pigovian_tax)

Very close to “steuern” is also the German word “umsteuern”, i.e. “re-directing”, which signifies correcting mistakes from a previous state. In our case it could mean, for example, to correct the widening of the Wealth Gap or the continuation of borrowing and increasing the debt load by redistributing wealth instead.

A major problem for this research was the fact that no unanimously accepted and used glossary existed for the translation of German and English language technical terms. For example: What commonly is discussed as Wealth Tax in Germany is called “Net-Worth Tax” in the Glossary provided by the Federal Ministry of Finance (Federal Ministry of Finance, 2011) or is subordinated under “Property Tax” in the OECD Revenue Surveys. Therefore an own Glossary was developed and is also published on the Project Website.

### 3 Historical Context

#### 3.1 Context up to 1870

The medieval European State did not know a modern taxation based system of financing imperial administration or special expenses such as war. Income in those days came from own possessions, especially from the lease of land, regular levies and duties paid in natural goods (“The tenth”) by those working it and special “collections” if need arose, e.g. to finance a crusade or war (Hacke, 2012). Taxation as we know it emerged only after the economical system based on the exchange of natural goods was replaced by an economical system based on the exchange of money. The modern state therefore can be called “tax based state”, because the collection of tax and its use for standing armies, infrastructure and other emerging public tasks presupposed an efficient bureaucracy and administration and at the same time financed its existence.

There are differences in the development of states and administrations emerging within the Anglo-Saxon (protestant) tradition, which is very much focused on the individual and their "pursuit of happiness" within the framework of a free (and strong) marketplace, and the central European (Catholic) tradition with an emphasis on community, common good, social partnership and state regulation. In the more recent history, there are similarities, however: In the two revolutions in (protestant) USA in 1776 and (catholic) France (1789) unfair-disproportionate taxation and unjustified privileges of a detested elite were major reasons behind the popular uprising. In the US, the cry ‘No taxation without representation’ leads fairly quickly to a parliamentary democracy, but also in central Europe taxation no longer was imposed on some part of society while others profited from it. Rather, a link between taxation and public tasks and/or expenses for the common good was established and – on part of state authorities – with due transparency and accountability respected.<sup>3</sup>

Given this historical background, Liebert (2011, p. 67) identifies four major types of states to emerge in Europe, all of which are different in their approach to taxation and social welfare:

First there is the classical Welfare State, the group of states, into which Germany also belongs. They are characterized by a high taxation of income, additional social security contributions and a comparatively lower taxation of capital. Second, Nordic states with an over proportionate taxation income in relation to GNI and high indirect taxation, in

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<sup>3</sup> Cf. (Evangelische Kirche in Deutschland, 2009, p. 16)

combination with a high degree of social security and redistribution of wealth. Third: Countries in the Anglo-Saxon tradition, with reduced taxes and state involvement in social security and instead a stronger emphasis on private provision. Fourth and last a group of new EU Member States with low direct taxes and a stronger emphasis on indirect taxation.

### **3.2 1870 to the end of World War II**

In order to understand the German state and its approach to taxation and social welfare, one needs to go back to the so-called Second German Empire which was established after the 1870 war between the French Empire and a German coalition, which resulted into the proclamation of the so-called Second Empire under William I and Otto von Bismarck as Chancellor. Soon afterwards started attempts to harmonize existing tax administration spread among and closely guarded by local principalities and kingdoms. A number of questions and frontlines known also today emerged as early as those days, for example:

While Chancellor Bismarck was an advocate of expanding already existing indirect taxation, the then Finance Minister von Miquel succeeded in 1892/1893 in implementing a new tax system based on direct progressive taxation of income and wealth for Prussia, which subsequently was adapted by other German States. This process was brought to completion by the implementation of a unified German Taxation System by the Weimar Republic Minister Matthias Erzberger in his Reform 1919/1920.

In another area, however, both Bismarck and the reformer were united: The creation of a social security system, which is not financed to a large extent by taxation, but by mandatory social security contributions.<sup>4</sup>

A very interesting discussion is finally the relationship between income earned with labour and unearned income from wealth assets (*fundiertes Einkommen*). Here the initial reformers had the opinion that the latter need to be taxed harder due to fairness reasons → see GW/III(IncomeTax)#.

### **3.3 The Federal Republic of Germany**

Today's Germany is no longer a strongly centralized state. One of the consequences of defeat after World War II was the creation of a federal republic, where strong states (=Länder) coexist within a federation. Legal initiatives can originate with the federal government, but also the chamber of states. This federal structure also has an impact on administration and responsibilities shared between municipalities, states and the federation, which will become a main cause for many problems pertaining to the German tax laws and tax administration.

Catholic Social Teaching and other elements of Christian Ethics were among strands of thought influencing the German Post War Constitution, the Basic Law (*Grundgesetz*): Its principles such as Personality/Human Dignity, Solidarity, Subsidiarity, Sustainability, Justice, Common Good, etc. are reflected in many important articles of the constitution. Also the famous concept of "Social Market Economy" (*soziale Marktwirtschaft*), which is behind German post-war prosperity and social stability, is heavily indebted to Catholic Social Teaching and Christian Ethics.<sup>5</sup>

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<sup>4</sup> Cf. (Evangelische Kirche in Deutschland, 2009, p. 22ff.)

<sup>5</sup> For further reading see e.g. Rauscher, A. (2008) *Handbuch der Katholischen Soziallehre*. Duncker & Humblot: Berlin, Einleitung and (Pehlemann, 2007, p. 90ff.)

## 4 German Constitution

### 4.1 Taxation relevant principles

Also Germany knows established international taxation principles (Kabinga & al., 2016) and applies them for its own legislation and administration. Among the more commonly known principles in the federal constitution relevant for tax laws and tax administration are the following:

- The ability-to-pay principle (Art. 3 para. 1 Basic Law)
- Equality in taxation (Art. 3 para. 1 Basic Law).
- The lawfulness of taxation (Art. 2 para. 1 and Art. 20 para. 3 Basic Law)
- Social obligation arising from property (“Eigentum verpflichtet”, Art. 14 Basic Law)
- The welfare state principle (*Sozialstaatsprinzip*, Art. 20 Basic Law), combined with the task of the federal government to take care that there are comparable (*gleichwertige*) living conditions everywhere in the federal republic (Art. 72, para 2 Basic Law).
- The Net-Principle regarding Income Tax.<sup>6</sup>

Saying that, nothing is as simple as it looks, just two examples:

- The concept of property enshrined in Article 14 has two dimensions to it: First, regarding material items (based on the Code of Civil Rights, BGB §903) and second a wider concept, including intellectual, i.e. non-material property and closer to the concept of wealth; all this is of importance when arguing with the concept and drawing out conclusions or implications. (Nell-Breuning, 1980, p. 192) .
- A similar „multi-dimensionality“ is inherent Article 20 in regards to the Welfare State Principle: There is no binding interpretation in constitutional law, but important guidelines are provided by the ruling of the Federal Constitutional Court.<sup>7</sup> This, in turn, has not the same binding force as if the interpretative content were enshrined in the constitution itself.

Because taxation is a forcible intervention of the state into the freedom, liberty and possession of the individual, there are strict rules to be observed: No taxation is permitted which is not (a.) based on a law/legal instrument, which has (b) not been passed by a democratically elected or legitimized institution. And (c.) the state is bound in all he does by law. All in all, the following important principles arising from constitutional foundations apply for the German taxation system:

- The Principle of Legality of taxation
- The Principle of Equability of taxation (*Gleichmäßigkeit*)
- The Principle of Ability to Pay (*Leistungsfähigkeit*)

<sup>6</sup> This principle results from Art. 106/107 Basic Law and is of lower relevance than the preceding principles. It has, however, a major influence when it comes to tax individual income and is linked to the first principle, namely the “ability to pay” principle. See [http://de.wikipedia.org/wiki/Nettoprinzip\\_\(Steuerrecht\)](http://de.wikipedia.org/wiki/Nettoprinzip_(Steuerrecht))

<sup>7</sup> „Zwar fehlt für das Sozialstaatsprinzip eine nähere verfassungsrechtliche Ausgestaltung, jedoch ist dieses Prinzip nach Interpretation des Bundesverfassungsgerichts »vorzüglich« deshalb zum Verfassungsgrundsatz erhoben worden, um »schädliche Auswirkungen schrankenloser Freiheit zu verhindern und die Gleichheit fortschreitend bis zu dem vernünftigerweise zu fordernden Maße zu verwirklichen«. Dementsprechend war die Sozialstaatsklausel für das Bundesverfassungsgericht seit jeher auch vor allem ein Gestaltungsauftrag an den Gesetzgeber, für einen Ausgleich der sozialen Gegensätze und damit für eine gerechte Sozialordnung zu sorgen.“ (Borchert, 2014, p. 48)

The last two are of utmost importance, because they reflect the anthropological and ethical insight that people are equal and unequal at the same time (#Ethics01). Therefore indeed there is a material and personal dimension which needs to be reflected in taxation law, if that law deserves the classification of being “just”:

- Equal things need to be treated and taxed equal, different things need to be taxed differently.
- People of equal ability to perform and pay need to be taxed equal, while the burden of those being able to perform and pay better need to be treated differently.

That reflects two more specific principles of just taxation: Horizontal Justice and Vertical Justice.<sup>8</sup>

Given the importance of any constitution for all subsequent laws and regulations of lesser importance, everything building upon it has to be measured constantly whether it lives up to its basic constitutional foundation and standards – a fact which will also have its influence on the reflection done in this research and advocacy project.<sup>9</sup>

## 4.2 Tax relevant rulings of German Courts

Essential for the interpretation and application of tax law and the compatibility of practical legal and administrative implications are the rulings of German courts, since the citizen is permitted to appeal against decisions of tax administrations and, if the case contains issues worthwhile clarification move up the entire chain of jurisdiction up to the highest German Courts, among which are the Federal Constitutional Court, the Federal Supreme Administrative Court, the Federal Financial Court, the Federal Supreme Court (Bundesgerichtshof). Given the European integration, even further appeal might be possible at the European Court of Justice in Luxemburg.

The ruling of those courts can also force government and parliament to correct laws and administrative regulations and the application of the laws. Some landmark decisions are, for example, and are addressed in some places of this research project:

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<sup>8</sup>Der „, allgemeine Gleichheitssatz (Art. 3 Abs. 1 GG) gebietet dem Gesetzgeber, wesentlich Gleiches gleich und wesentlich Ungleiches ungleich zu behandeln (vgl. BVerfGE 116, 164 <180>; stRSpr)“  
See Decision 2 BvL 1/00 B,I,1a of 12 May 2009. Retrieved from [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/05/1s20090512\\_2bvl000100.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/05/1s20090512_2bvl000100.html) Siehe auch etwa BVerfGE 112, 268 [279 f.] of 16 March 2005 zu Kinderbetreuungskosten Alleinerziehender:

„Aus Art. 3 I GG ergeben sich je nach Regelungsgegenstand und Differenzierungsmerkmalen unterschiedliche Grenzen, die vom bloßen Willkürverbot bis zu einer strengen Bindung an Verhältnismäßigkeitserfordernisse reichen. Im Bereich des Steuerrechts, insb. des Einkommensteuerrechts, wird die Gestaltungsfreiheit des Gesetzgebers durch das Gebot der Besteuerung nach der finanziellen Leistungsfähigkeit begrenzt. Im Interesse verfassungsrechtlich gebotener steuerlicher Lastengleichheit muss deshalb darauf abgezielt werden,

- dass Steuerpflichtige bei gleicher Leistungsfähigkeit auch gleich hoch besteuert werden („horizontale“ Steuergerechtigkeit),
- während (in „vertikaler“ Richtung) die Besteuerung höherer Einkommen im Vergleich mit der Steuerbelastung niedrigerer Einkommen dem Gerechtigkeitsgebot genügen müssen.“

In: Gröpl. A. (no year) Allgemeiner Gleichheitssatz im Steuerrecht. Retrieved from [http://www.uni-saarland.de/fileadmin/user\\_upload/Professoren/fr11\\_ProfGroep1/Vergangene\\_Semester/lehre08/AO08.pdf](http://www.uni-saarland.de/fileadmin/user_upload/Professoren/fr11_ProfGroep1/Vergangene_Semester/lehre08/AO08.pdf)

<sup>9</sup> More on the influence and importance of CST see E/0 and related chapters of the Ethics part of this research.

- A 1983 1 (BvR 209/83) ruling regarding tension between the right to data privacy with public interest → see GER/VII/5.8.5.3
- A 1991 (2 BvR 1493/89) ruling on banking secrecy and the need to balance in the case of wealthy people their freedom in declaring income and wealth by adequate verification measures → see GER/Va/7.3
- The 1995 (2 BvL 37/91) verdict on the constitutionality of the Wealth Tax: 1995 verdict → GW/V(Wealth Tax)#
- The 2006 (BvR 2194/99) verdict that the combined burden of income from wage and income from business beyond 50% is not unconstitutionally → GW/III (Income Tax)#
- The 2014 verdict (BvR 1656/09) that a higher relative burden via indirect taxation unconstitutional, even though other parties may pay a higher absolute amount → G/V/5.2.4 Technical
- The 2006 and especially 2014 (BvL 21/12) verdict on the constitutionality of the Inheritance and Gift Tax → GW/VI(Inheritance Tax)#
- The 2005 verdict (5 StR 119/05) of the Federal Supreme Court regarding the personnel assigned to complex (economical/financial) fraud cases → G/Va/7.3

## 5 Bavarian Constitution

Also state constitutions have articles of direct or indirect relevance for taxation and also state constitutions are influenced by Catholic Social Teaching and its principles. This applies very much so for the constitution of Bavaria:<sup>10</sup>

### 5.1 Tax relevant principles

The following passages taken from the Bavarian Constitution are of relevance for taxation and tax policies:

Artikel 3 Grundlagen des Bayerischen Staates

(1) <sup>1</sup>Bayern ist ein Rechts-, Kultur- und Sozialstaat.<sup>2</sup>Er dient dem Gemeinwohl.

(2) <sup>1</sup>Der Staat schützt die natürlichen Lebensgrundlagen und die kulturelle Überlieferung.<sup>2</sup>Er fördert und sichert gleichwertige Lebensverhältnisse und Arbeitsbedingungen in ganz Bayern, in Stadt und Land.

Artikel 103 Gewährleistung von Eigentum und Erbrecht

(1) Eigentumsrecht und Erbrecht werden gewährleistet.

(2) Eigentumsordnung und Eigentumsgebrauch haben auch dem Gemeinwohl zu dienen.

Artikel 123 Angemessene Besteuerung

(1) Alle sind im Verhältnis ihres Einkommens und Vermögens und unter Berücksichtigung ihrer Unterhaltungspflicht zu den öffentlichen Lasten heranzuziehen.

(2) Verbrauchssteuern und Besitzsteuern müssen zueinander in einem angemessenen Verhältnis stehen.

(3) Die Erbschaftssteuer dient auch dem Zwecke, die Ansammlung von Riesenvermögen in den Händen einzelner zu verhindern. Sie ist nach dem Verwandtschaftsverhältnis zu staffeln.

Artikel 151 Die Wirtschaftsordnung

<sup>10</sup> For the text see [https://www.bayern.landtag.de/fileadmin/scripts/get\\_file/Bayerische\\_Verfassung.pdf](https://www.bayern.landtag.de/fileadmin/scripts/get_file/Bayerische_Verfassung.pdf)

(1) Die gesamte wirtschaftliche Tätigkeit dient dem Gemeinwohl, insbesondere der Gewährleistung eines menschenwürdigen Daseins für alle und der allmählichen Erhöhung der Lebenshaltung aller Volksschichten.

(2) <sup>1</sup>Innerhalb dieser Zwecke gilt Vertragsfreiheit nach Maßgabe der Gesetze.<sup>2</sup>Die Freiheit der Entwicklung persönlicher Entschlußkraft und die Freiheit der selbständigen Betätigung des einzelnen in der Wirtschaft wird grundsätzlich anerkannt.<sup>3</sup>Die wirtschaftliche Freiheit des einzelnen findet ihre Grenze in der Rücksicht auf den Nächsten und auf die sittlichen Forderungen des Gemeinwohls.<sup>4</sup>Gemeinschädliche und unsittliche Rechtsgeschäfte, insbesondere alle wirtschaftlichen Ausbeutungsverträge sind rechtswidrig und nichtig.

Artikel 157 Kapitalbildung; Geld- und Kreditwesen

(1) Kapitalbildung ist nicht Selbstzweck, sondern Mittel zur Entfaltung der Volkswirtschaft.

(2) Das Geld- und Kreditwesen dient der Werteschaffung und der Befriedigung der Bedürfnisse aller Bewohner.

Artikel 158 Sozialbindung des Eigentums

Eigentum verpflichtet gegenüber der Gesamtheit. Offenbarer Missbrauch des Eigentums- oder Besitzrechts genießt keinen Rechtsschutz

Artikel 161

(1) <sup>1</sup>Die Verteilung und Nutzung des Bodens wird von Staats wegen überwacht.<sup>2</sup> Mißbräuche sind abzustellen.

(2) Steigerungen des Bodenwertes, die ohne besonderen Arbeits- oder Kapitalaufwand des Eigentümers entstehen, sind für die Allgemeinheit nutzbar zu machen.

Artikel 168 Die Arbeit

(1) <sup>1</sup>Jede ehrliche Arbeit hat den gleichen sittlichen Wert und Anspruch auf angemessenes Entgelt.<sup>2</sup>Männer und Frauen erhalten für gleiche Arbeit den gleichen Lohn.

(2) Arbeitsloses Einkommen arbeitsfähiger Personen wird nach Maßgabe der Gesetze mit Sondersteuern belegt.

(3) Jeder Bewohner Bayerns, der arbeitsunfähig ist oder dem keine Arbeit vermittelt werden kann, hat ein Recht auf Fürsorge.

Artikel 169

(1) Für jeden Berufszweig können Mindestlöhne festgesetzt werden, die dem Arbeitnehmer eine den jeweiligen kulturellen Verhältnissen entsprechende Mindestlebenshaltung für sich und seine Familie ermöglichen.

## **5.2 The obvious question**

In principle, therefore, the constitution of Bavaria provides some marvellous guidelines also for the diminution of inequality and poverty as well as tax justice relevant issues, for example the explicit recommendation regarding inheritance laws or the taxation of real property and capital.

When asking conversation partners, why this is not clearly visible in Bavarian tax policies, administrators reply that the Basic Law supersedes the Bavarian constitutions and therefore also the Bavarian government is primarily bound by the Federal Constitution rather than its own...

## 6 Legal, Illicit, Illegal

Here, too, one needs to remember issues arising from the complexity of law, i.e. international treaties as well as national law, its application and interpretation by courts: In Germany, no equivalent expression for the term “illicit” exists, which in the English context immediately suggests something which is both legal, and yet not quite legal, but also not illegal, namely, the huge grey area which arises from complexity and all the options which can be created and applied with it. As explained in I/IV/6.1, an important issue here is whether law is applied only to the letter, or also with regards to its spirit, i.e. to the intention of the legislator. As the hearing at the Committee of Public Accounts at the House of Commons revealed, skilled tax lawyers, consultants and accountants tend to create “tax saving options” by just stretching the law beyond that which the legislator intended, that way creating illicit advantages for the tax subject. Since revenue authorities are always hard pressed for resources, those consultants can be pretty confident that their “composition” goes through and is not challenged in court for a judicial review. It is this “stretching beyond the intention” which the British parliamentarians call “aggressive tax avoidance.” (Committee on Public Accounts, 2013), see also GER/Va and GER/VII/2.3).

There is no indication whatsoever that tax consultants and lawyers behave differently in Germany, thus stretching constitutional, legal and administrative rules to its limits.

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