

# REGULATION 2018/1725: THE NEW CHAPTER ON PROCESSING OF OPERATIONAL DATA



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# Topics covered

- Introduction: rationale and “drafting history” of this new chapter
- Content: provisions regarding the processing of operational data
- Relationship with existing rules on processing of operational data in the founding acts of Union bodies, offices and agencies: the example of Eurojust
- Some concluding remarks

# **INTRODUCTION: RATIONALE AND “DRAFTING HISTORY” OF THIS NEW CHAPTER**

# Rationale and “drafting history” of this new chapter

- Real novelty of this Regulation
- Wish of the European Parliament to reach a complete harmonisation, initially even willing to delete all DP provisions from founding acts of the agencies in question
- Initial wish to cover all JHA agencies
- Result is compromise bringing in provisions mainly of Directive 2016/680 (LE directive) as “*lex generalis*” and allowing specific provisions in founding acts as “*lex specialis*”
- Europol and EPPO for the time being not covered

# Legal background of this chapter

- Declaration 21 Treaty of Lisbon: specific rules for DP in fields of police and judicial cooperation could prove necessary. Therefore distinct chapter.
- Wish to prevent any divergences hampering the exchange of personal data between EU bodies, offices or agencies operating in this field and national competent authorities who apply Directive 2016/680

# Lex generalis-lex specialis relation

- Recital 11 Preamble:

The general rules of the Chapter of this Regulation on the processing of operational personal data should apply without prejudice to the specific rules applicable to the processing of operational personal data by Union bodies, offices and agencies when carrying out activities falling within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU. **Such specific rules should be regarded as *lex specialis* to the provisions in the Chapter of this Regulation on the processing of operational personal data (*lex specialis derogat legi generali*).** In order to reduce legal fragmentation, specific data protection rules applicable to the processing of operational personal data by Union bodies, offices or agencies when carrying out activities falling within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU should be consistent with the principles underpinning the Chapter of this Regulation on the processing of operational personal data, as well as with the provisions of this Regulation relating to independent supervision, remedies, liability and penalties.

# Application

- This Chapter should apply to Union bodies, offices and agencies when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU, whether they exercise such activities as their main or ancillary tasks, for the purposes of the prevention, detection, investigation or prosecution of criminal offences.
- It should not apply to Europol or to the European Public Prosecutor's Office until the legal acts establishing Europol and the European Public Prosecutor's Office are amended with a view to rendering the Chapter of this Regulation on the processing of operational personal data, as adapted, applicable to them.
- Review by European Commission no later than 30 April 2022 and, on the basis of that review, *the Commission may submit appropriate legislative proposals, in particular with a view to applying Chapter IX of this Regulation to Europol and the European Public Prosecutor's Office and including adaptations of Chapter IX of this Regulation, if necessary.*

# **CONTENT: PROVISIONS REGARDING THE PROCESSING OF OPERATIONAL DATA**



# Operational data (art. 3.2)

- ‘operational personal data’ means all personal data processed by Union bodies, offices or agencies when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU to meet the objectives and tasks laid down in the legal acts establishing those bodies, offices or agencies;
- Only article 3 (definitions) and chapter IX apply to operational data

# Application of the chapter

- This Chapter applies only to the processing of operational personal data by Union bodies, offices and agencies when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU, without prejudice to specific data protection rules applicable to such a Union body, office or agency.

# Provisions included

- Very much “inspired” by LE Directive
- Principles : lawfulness and fairness, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality.
- Processing by another controller and accountability (demonstrate compliance)
- Lawfulness of processing: only if and to the extent that the processing is necessary for the performance of a task within the scope of chapter 4 or 5 of Title V of Part three TFEU and based on Union law

# Provisions included II

- Distinction between different categories of data subjects
- Distinction between operational data based on facts from data based on personal assessments
- Verification of quality of operational data:
  - ❑ Reasonable steps to ensure that operational data which are inaccurate, incomplete or no longer up to date are not transmitted or made available;
  - ❑ Controller shall as far as practicable and where relevant, verify the quality of operational personal data before they are transmitted or made available, for example by consulting the competent authority from which the data originates.
  - ❑ As far as possible, in all transmissions of operational personal data, the controller shall add the necessary information enabling the recipient to assess the degree to which the operational personal data are accurate, complete and reliable, and the extent to which they are up to date.
  - ❑ If it emerges that incorrect operational personal data have been transmitted or that operational personal data have been unlawfully transmitted, the recipient shall be notified without delay
- Specific processing conditions should be complied with
- Processing of specific categories of operational personal data: only if strictly necessary, subject to appropriate guarantees and informing DPO
- Automated individual decision making, including profiling

# Provisions included III

- Communication and modalities for exercising the rights of the data subject
  - Communication of information in a concise, intelligible and easily accessible form, using clear and plain language and by appropriate means, including by electronic means ( same form as the request).
  - Facilitation of exercise of rights, with reasonable timeframe (at the latest within three months after receipt of the request) and free of charge.
  - Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may refuse to act on the request.
  - Additional information necessary to confirm the identity of the data subject may be requested.
  
- Information to be made available or given to the data subject: at least that included in article 79.1, additional info in art 79.2. Information may be delayed, restricted or omitted in certain cases.
  
- Right of access by the data subject: right to have confirmation of processing and, if so, information as to purposes, legal basis, recipients, storage period, rights to rectification or erasure or restriction, right to lodge a complaint and communication of the operational information and any info as to its origin
- Limitations to the right of access:
  - Possible partial or complete restriction. In such cases the controller shall inform the data subject, without undue delay, in writing of any refusal or restriction of access and of the reasons. Information may be omitted if it undermines the purpose of the restriction.
  - The controller shall inform the data subject of the possibility of lodging a complaint with the EDPS or of seeking a judicial remedy before the Court of Justice.
  - The controller shall document the factual or legal reasons on which the decision is based. That information shall be made available to the EDPS on request.

# Provisions included IV

-Similar provision as to right of rectification or erasure of operational personal data and restriction of processing

-Right of access in criminal investigations and proceedings: Where operational personal data originates from a competent authority, Union bodies, offices and agencies shall, prior to deciding on a data subject's right of access, verify with the competent authority concerned whether such personal data are contained in a judicial decision or record or a case file processed in the course of criminal investigations and proceedings in the Member State of that competent authority. Where this is the case, a decision on the right of access shall be taken in consultation and in close cooperation with the competent authority concerned.

•Exercise of rights by the data subject and verification by the EDPS (like indirect access in some MS in the past and now in LE directive) Where EDPS acts on behalf of data subject, the data subject should be informed by the DPA at least that all necessary verifications/reviews have taken place. Even after that the data subject has a right to seek a judicial remedy

- Data protection by design and by default
- Joint controllers (need for an arrangement)
- Processor (sufficient guarantees and need for contract in writing)
- Logging for verification of lawfulness of processing, self monitoring, ensuring integrity and security and for criminal proceedings. Kept for 3 years and made available to EDPS on request.
- Data protection impact assessment
- Prior consultation of the EDPS
- Security of processing of operational personal data
- Notification of personal data breach to the EDPS not later than 72h after becoming aware
- Communication of a personal data breach to the data subject

# Provisions included V

- Transfer of personal data to third countries and international organisations:
  - based on adequacy decision, international agreement with the EU adducing adequate safeguards or international agreement concluded by agency/body/office before the date of application of founding legal act
  - More specific provisions in founding acts
  - Website publication of all relevant documents
  - Detailed records of transfers to be kept

# Provisions included VI

- Secrecy of judicial inquiries and criminal proceedings: The legal acts establishing the Union bodies, offices or agencies carrying out the activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU may oblige the European Data Protection Supervisor, in the exercise of his or her supervision powers, to take utmost account of the secrecy of judicial inquiries and criminal proceedings, in accordance with Union or Member State law.



# **RELATIONSHIP WITH EXISTING RULES ON PROCESSING OF OPERATIONAL DATA IN THE FOUNDING ACTS OF UNION BODIES, OFFICES AND AGENCIES: THE EXAMPLE OF EUROJUST**

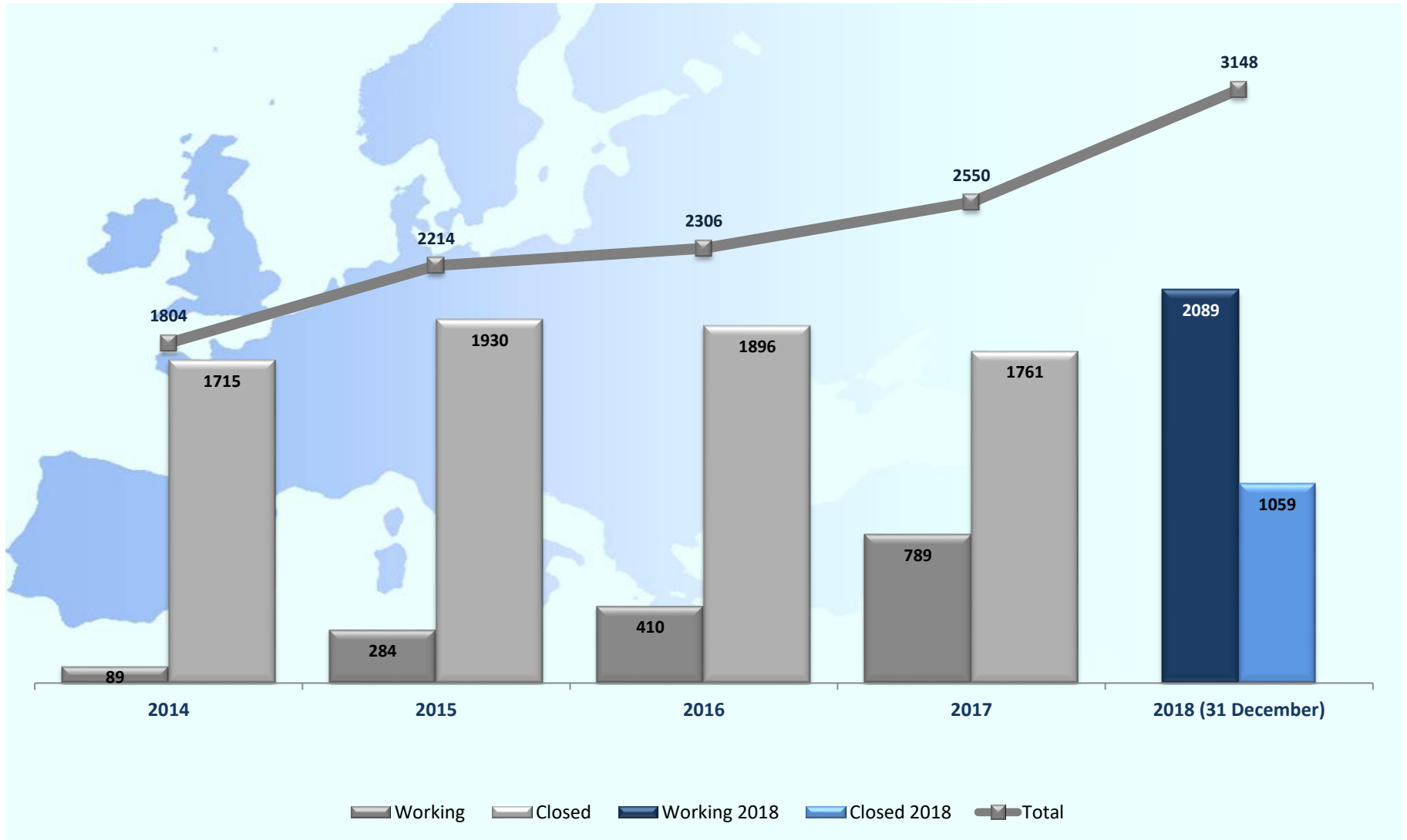
# Eurojust



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- **What Is Eurojust?**  
Eurojust is a (new) European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime.
- **What Is Eurojust Doing?**  
Eurojust stimulates and improves the co-ordination of investigations and prosecutions between competent authorities in the Member States. Eurojust improves co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports the competent authorities of the Member States in order to render their investigations and prosecutions more effective when dealing with cross border crime.

# Eurojust Casework 2014–2018

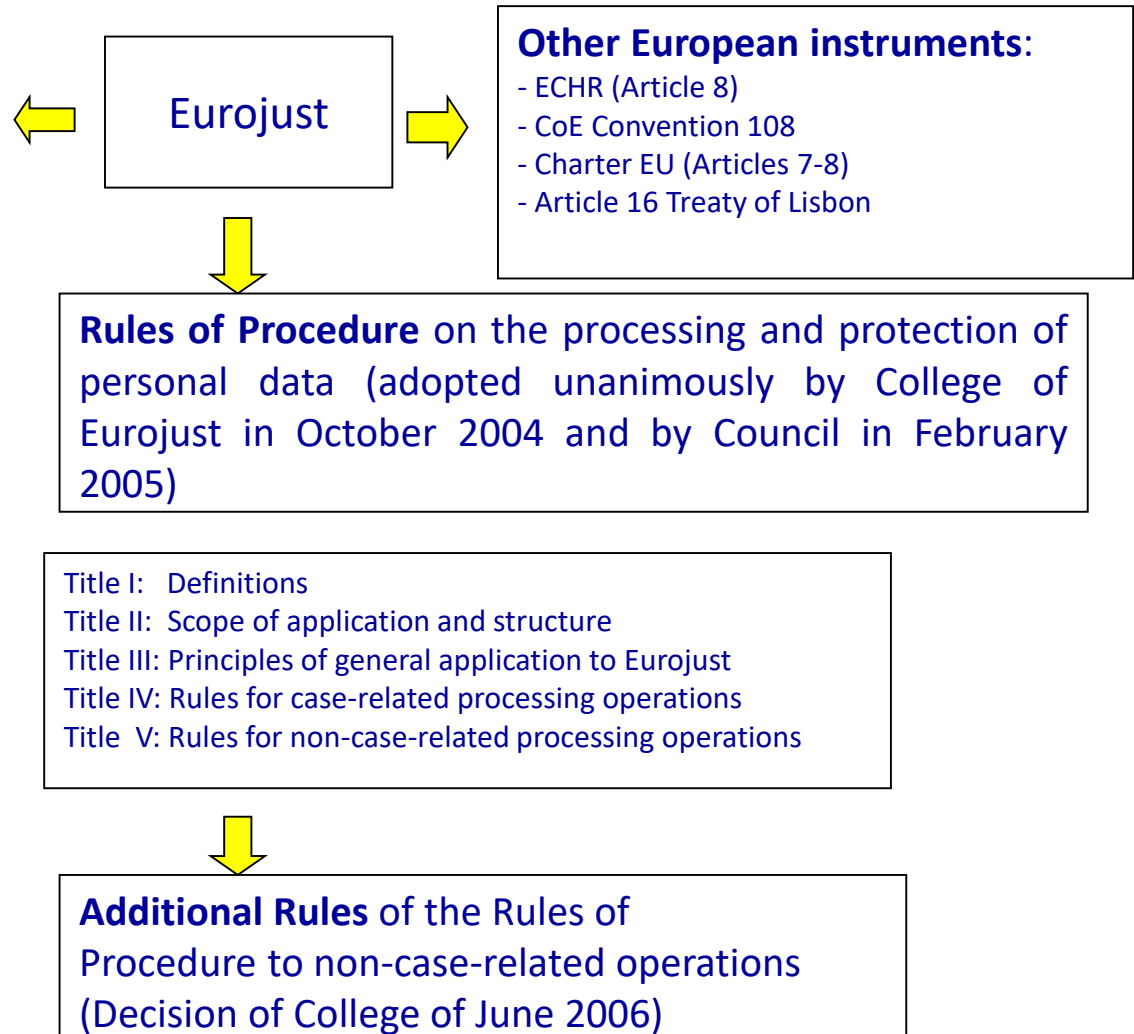


# The present Data Protection regime of Eurojust: robust, effective and tailor-made

**Eurojust Decision** contains detailed provisions on data protection (**Articles 14-25**)

- Art.14: Processing of personal data
- Art.15: Restrictions on the processing of personal data
- Art.16: CMS, index and temporary work files
- Art. 16a: Functioning of temporary work files and index
- Article 16b: Access to the CMS at national level
- Art.17: Data Protection Officer
- Art.18: Authorised access to personal data
- Art.19: Right of access to personal data
- Art.20: Correction and deletion of personal data
- Art.21: Time limits for the storage of personal data
- Art.22: Data Security
- Art.23: Joint Supervisory Body
- Art.24: Liability for unauthorised or incorrect processing of data
- Art.25: Confidentiality

**Revised Eurojust Decision of 16 December 2008** reinforces the DP system, defining more precisely provisions and introducing some principles of DP RoP in the text



# Future DP regime of Eurojust: harmonised but still robust, effective and tailor-made

## Regulation 2018/1725 Chapter IX (*lex generalis*)

- Scope: without prejudice to specific DP rules
- Principles
- Lawfulness
- Distinction between different categories of data subjects
- Distinction between operational data and verification of quality of operational data
- Specific processing conditions
- Processing of specific categories of operational personal data
- Automated individual decision making, including profiling
- Communication and modalities for exercising the rights of the data subject
- Information to be made available or given to the data subject
- Right of access by the data subject
- Limitations to the right of access
- Right of rectification or erasure of operational personal data and restriction of processing
- Right of access in criminal investigations and proceedings
- Exercise of rights by the data subject and verification by the European Data Protection Supervisor
- Data protection by design and by default
- Joint controllers
- Processor
- Logging
- Data protection impact assessment
- Prior consultation of the EDPS
- Security of processing of operational personal data
- Notification of personal data breach to the EDPS
- Communication of a personal data breach to the data subject
- Transfer of personal data to third countries and international organisations
- Secrecy of judicial inquiries and criminal proceedings

## Eurojust: operational data regime

## Eurojust Regulation (*lex specialis*)

- Exchanges of information between the MS and NMs
- CMS, index and temporary work files
- Processing of personal data by Eurojust
- Processing of operational personal data
- Processing under the authority of EJ or processor
- Time limits for storage of operational personal data
- Security of operational personal data
- Right of access by the data subject
- Limitations to the right of access
- Right to rectification or erasure of operational personal data and restriction of processing
- Authorised access to operational personal data within Eurojust
- Records of categories of processing activities
- Designation of the DPO
- Position of the DPO
- Tasks of the DPO
- Communication of a personal data breach to the authorities concerned
- Supervision by the EDPS
- Professional secrecy by the EDPS
- Cooperation between EDPS and national DPAs
- Right to lodge a complaint with the EDPS with respect to operational personal data
- Right to judicial review against the EDPS
- Responsibility in DP matters
- Liability for unauthorised or incorrect processing of data
- Common provisions
- Liaison magistrates posted to third countries
- Section IV: transfers of personal data
- Annex II on categories of data subjects

**Rules of Procedure to be reviewed/developed + internal procedures to be reviewed/developed**

## Entry into force

- “this Regulation (2018/1725) shall apply to processing of personal data by Eurojust from [the date of entry into application of the new Eurojust Regulation]”
- 12 December 2019

## Administrative data

- Full application of Regulation 2018/725: same situation as all other EU institutions, agencies and bodies
- Our present admin data regime was already inspired by Regulation 45/2001
- “New” principles: accountability, DP by design and by default, records.....

# New supervisory scheme

- EDPS+ No cooperation board
- Cooperation between the European Data Protection Supervisor and national data protection authorities (article 62 Regulation 2018/1725+ article 42 EJ Regulation)

- *Article 42 Cooperation between the EDPS and national supervisory authorities*

*1. The EDPS shall act in close cooperation with national supervisory authorities with respect to specific issues requiring national involvement, in particular if the EDPS or a national supervisory authority finds major discrepancies between practices of the Member States or potentially unlawful transfers using Eurojust's communication channels, or in the context of questions raised by one or more national supervisory authorities on the implementation and interpretation of this Regulation.*

*2. In the cases referred to in paragraph 1, coordinated supervision shall be ensured in accordance with Article 62 of Regulation (EU) 2018/1725.*

*3. The EDPS shall keep national supervisory authorities fully informed of all issues that directly affect them or are otherwise relevant to them. Upon a request from one or more national supervisory authorities, the EDPS shall inform them on specific issues.*

*4. In cases relating to data originating from one or several Member States, including cases referred to in Article 43(3), the EDPS shall consult the national supervisory authorities concerned. The EDPS shall not decide on further action to be taken before those national supervisory authorities have informed the EDPS of their position, within a deadline specified by the EDPS. That deadline shall not be shorter than one month or longer than three months. The EDPS shall take utmost account of the position of the national supervisory authorities concerned. In cases where the EDPS intends not to follow their position, he or she shall inform them, provide a justification, and submit the matter to the European Data Protection Board.*

*5. In cases which the EDPS considers to be extremely urgent, he or she may decide to take immediate action. In such cases, the EDPS shall immediately inform the national supervisory authorities concerned and substantiate the urgent nature of the situation and justify the action he or she has taken.*



# CONCLUDING REMARKS

# Some concluding remarks

- Was this chapter really necessary and does it really add something from the DP perspective?
- In how far can we talk about avoiding fragmentation when we keep Europol and the EPPO outside the scope? Review clause
- How will the *lex specialis-lex generalis* interpretation work in practice? Harmonisation means de facto more layers of rules to be applied.....

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