

K.R. Balabiyev^{1*}, **T.M. Narbekova¹**, **У.А. Ахатов²**

¹Central Asian Innovation University, Kazakhstan, Shymkent

²Al-Farabi Kazakh National University, Kazakhstan, Almaty

*e-mail: balabi.kairat@mail.ru

CRIMINAL LIABILITY FOR ILLEGAL ENTREPRENEURSHIP, ILLEGAL BANKING ACTIVITY, MICROFINANCIAL OR COLLECTION ACTIVITIES: COMPARATIVE LEGAL ANALYSIS OF CRIMINAL LEGISLATION OF FOREIGN COUNTRIES

Article 26 of the Constitution of the Republic of Kazakhstan specifies the right of every person to freedom of entrepreneurial activity. Entrepreneurship at the current stage is a substantial sector that provides citizens and state with all benefits, promotes the growth of jobs, as well as speedy progress of various industries. The significance of such activity for the country economy represents the importance and high priority of protecting legal entrepreneurial, banking, microfinance and collection activities, as well as improving the criminal legal framework.

Existence of illegal entrepreneurship, illegal banking, microfinance and collection activities in the state facilitates the occurrence of negative consequences, which include the loss by the legislator of control over a certain activity, infliction of huge damage to society, the development of shadow economy, as well as an increase in the number of crime. Situation at hand requires the preparation of methods that will help effectively combat mentioned type of crime.

Socially dangerous act that relates to illegal business, illegal banking, microfinance or collection activities is qualified according to the article 214 of the Criminal Code of the Republic of Kazakhstan. The disposition of

The disposition of the concerned article has the blanket nature, the existence of concepts of an evaluative character, as well as occurrence of contradictions between regulatory legal acts that leads to the uprise of certain difficulties in the qualification of the act.

Key words: illegal entrepreneurship, illegal banking activities, microfinance activities, collection activities, criminal liability, entrepreneurship, etc.

Қ.Р. Балабиев^{1*}, Т.М. Нарбекова¹, У.А. Ахатов²

¹Орталық Азия инновациялық университеті, Қазақстан, Шымкент қ.

²Әл-Фараби атындағы Қазақ ұлттық университеті, Қазақстан, Алматы қ.

*e-mail: balabi.kairat@mail.ru

Заңсыз кәсіпкерлік, заңсыз банктік қызмет, микроқаржылық немесе коллекторлық қызмет үшін қылмыстық жауапкершілік: шет елдердің қылмыстық заңнамасын салыстырмалы-құқықтық талдау

Қазақстан Республикасы Конституциясының 26-бабында Әркімнің кәсіпкерлік қызмет бостандығына құқығы бекітілген. Кәсіпкерлік қызмет қазіргі кезеңде азаматтар мен мемлекетті барлық игіліктермен қамтамасыз ететін, жұмыс орындарының өсуіне, сондай-ақ түрлі салалардың қарқынды дамуына ықпал ететін қоректік сектор болып табылады. азаматтар мен тұтастай алғанда мемлекеттің игілігі, сондай-ақ осы Қызмет түрінің ел экономикасы үшін маңыздылығын қысқартуға ықпал етеді, заңды кәсіпкерлік, банктік, микроқаржылық және коллекторлық қызметті қорғаудың маңыздылығы мен бірінші кезектегі маңызын, сондай-ақ қылмыстық-құқықтық базаны жетілдіруді түсіндіреді.

Мемлекетте заңсыз кәсіпкерліктің, заңсыз банктік, микроқаржылық және коллекторлық қызметтің болуы теріс салдардың басталуына ықпал етеді, оған заң шығарушының белгілі бір қызметті бақылауды жоғалтуы, қоғамға үлкен зиян келтіруі, көлеңкелі экономиканың дамуы, сондай-ақ қылмыс санының артуы жатады. Қазіргі жағдай аталған қылмыспен тиімді күресу әдістерін әзірлеуді талап етеді.

Заңсыз кәсіпкерлікке, заңсыз банктік, микроқаржылық немесе коллекторлық қызметке байланысты қоғамдық қауіпті іс-әрекет Қазақстан Республикасы Қылмыстық кодексінің 214-бабы бойынша сараланады. Қарастырылып отырған баптың диспозициясы бланкеттік сипатқа, бағалау сипаты ұғымдарының болуына, сондай-ақ іс-әрекетті саралау кезінде белгілі бір қиындықтардың

пайда болуына әкелетін нормативтік-құқықтық актілер арасындағы қайшылықтардың пайда болуына тән.

Түйін сөздер: заңсыз кәсіпкерлік, заңсыз банк қызметі, микроқаржы қызметі, коллекторлық қызмет, қылмыстық жауапкершілік, кәсіпкерлік және т.б.

К.Р. Балабиев^{1*}, Т.М. Нарбекова¹, У.А. Ахатов²

¹Центрально-Азиатский инновационный университет, Казахстан, г. Шымкент

²Казахский национальный университет имени аль-Фараби, Казахстан, г. Алматы

*e-mail: balabi.kairat@mail.ru

Уголовная ответственность за незаконное предпринимательство, незаконную банковскую деятельность, микрофинансовую или коллекторскую деятельности: сравнительно-правовой анализ уголовного законодательства зарубежных стран

В статье 26 Конституции Республики Казахстана закреплено право каждого на свободу предпринимательской деятельности. Предпринимательская деятельность на современном этапе является питательным сектором, обеспечивающим граждан и государство всеми благами, способствует росту рабочих мест, а также быстрому развитию различных отраслей. благ граждан и государства в целом, также способствует сокращению. Значимость данного рода деятельности для экономики страны объясняет важность и первостепенное значение защиты законной предпринимательской, банковской, микрофинансовой и коллекторской деятельности, а также совершенствование уголовно-правовой базы.

Наличие незаконного предпринимательства, незаконной банковской, микрофинансовой и коллекторской деятельности в государстве способствует наступлению негативных последствий, к которым можно отнести потерю законодателем контроля над той или иной деятельностью, причинение крупного ущерба обществу, развитие теневой экономики, а также увеличение количества преступности. Сложившаяся ситуация требует выработки методов эффективной борьбы с указанным преступлением.

Общественно опасное деяние, связанное с незаконным предпринимательством, незаконной банковской, микрофинансовой или коллекторской деятельностью квалифицируется по статье 214 Уголовного Кодекса Республики Казахстан. Диспозиции, рассматриваемой статьи, присущ бланкетный характер, наличие понятий оценочного характера, а также возникновение противоречий между нормативно-правовыми актами, что ведет к появлению определенных сложностей при квалификации деяния.

Ключевые слова: незаконное предпринимательство, незаконная банковская деятельность, микрофинансовая деятельность, коллекторская деятельность, уголовная ответственность, предпринимательство и т.д.

Introduction

After the acquisition of the status of sovereign and independent state by Kazakhstan, the main point was the change of directions in political and social-economic activities. The new state course aimed at radical transition from socialistic system of management to the path of market economy. This change demanded a revision of almost all aspects of the economic activity of the new state. Because entrepreneurship is the main part of the development and prosperity of a market economy in the state, the main course was the rapid transfer from a prohibitive model of regulation to a permissive one. It stands to mention that entrepreneurship will always have a special role in the market economy, because this type of activity not only activates and stimulates the country's economy, but also opens up new markets and expands existing markets.

Nowadays the economy of modern Kazakhstan is characterized by the criminalization of most of the fields of economic activity. This statement can be confirmed by the fact that the criminal law provides criminal liability for illegal entrepreneurship, illegal banking, microfinance or collection activities.

Economic criminal offenses are becoming more common every year, as well as causing significant damage to the security of society and the state as whole. This provision is the result of a person's desire for rapid enrichment and satisfaction of his personal needs. This leads to non-compliance with the legislation of the republic of Kazakhstan, to violation of the rights and freedoms of other subjects of economic relations and, as a result, to increase in criminal offenses in this area.

Article 214 of the Criminal Code of the Republic of Kazakhstan provides criminal liability for illegal

business, illegal banking, microfinance, or debt collection activities. Due to the fact that the article under consideration has a blanket character, contains various evaluative concepts, contradictions between criminal and civil legislation, and, as a result, the emergence of difficulties and contradictions in the qualification of an unlawful act.

Methodology

The methodology of the research is based on harmonization of requirements of scientific and private scientific methods. The common scientific methods include objective and subjective factors of social development, taking into account their institutionalization and subordination. As for private methods, the following were used: formal-legal method, method of structural and system analysis, comparative-legal, logical, social methods, methods of analysis and synthesis.

Main part

Business development abroad at all historical stages has been characterized by faster pace and a progressive attitude towards the role of entrepreneurial activity in the economy. For instance, there are over 23 million small and medium-sized enterprises in the European Union, which generate more than half of the total turnover and added value. It is also worth noting the statistics from the People's Republic of China, where there are over 4.3 million small and medium-sized enterprises and 27.9 million individual enterprises, employing over 75% of the population.

Given the above data, it can be concluded that the importance of entrepreneurial activity is significant. Therefore, each state creates a favorable environment for business development and the protection of the rights and freedoms of entrepreneurs, as this sector is a key factor in economic development.

In order to succeed in the fight against economic crime and significantly minimize the negative consequences of its activities, a comprehensive approach is necessary, which includes social, economic, organizational and managerial, criminal-legal, administrative-legal, operational-search, ideological, and international measures (Gorodetsky 2009: 15).

Therefore, for a more detailed study of criminal liability for illegal entrepreneurship, illegal banking activities, microfinance or debt collection activities, it is advisable to consider similar legislation of foreign countries. This will allow identifying

positive and negative trends in the development of both domestic and foreign legislation.

According to the accurate definition of M. Ansel, "studying foreign experience opens up new horizons for a lawyer, allows him to better understand the law of his country because the specific features of this law are particularly clearly revealed in comparison with other systems. Comparison can arm a lawyer with ideas and arguments that cannot be obtained even with very good knowledge of only one's own law" (Ansel 1991: 38). Therefore, when considering economic crimes, including illegal entrepreneurship, illegal banking activities, microfinance or debt collection activities, in our country, it is necessary to refer to foreign experience in order to develop more rational and fair legal norms.

In the criminal legislation of both foreign countries and the Republic of Kazakhstan, there are provisions regulating entrepreneurial activity, banking, microfinance, and debt collection. This is primarily due to the state's desire to ensure economic security in the country and eliminate the possibility of criminal proceeds entering the legal sector of the economy.

In all countries that were once part of the USSR, the criminal codes contain uniform provisions directly regulating criminal liability for illegal entrepreneurial activity, illegal banking, microfinance, or debt collection. This is due to several factors, including the common historical development of the regulatory framework against the backdrop of the established ideological and political system. Additionally, there is a similar approach to combating crime, the imperfection of criminal legislation provisions, and the authorities' desire to direct the development of entrepreneurship in the right direction.

Analyzing the norms of the current Criminal Codes establishing liability for illegal entrepreneurial activity in the countries of the former USSR, the following points can be identified. For example, Article 214 of the Criminal Code of the Republic of Kazakhstan is practically identical to Article 171 of the Criminal Code of the Russian Federation. It should also be noted that in recent times, in the Russian Federation, activities aimed at decriminalizing Article 171 of the Criminal Code of the Russian Federation have intensified. An interesting point enshrined in the Criminal Code of the Russian Federation is that Article 171 is included in the list of offenses for which it is possible to be exempted from criminal liability under Part 2 of Article 76, in case the income from illegal activity is compensated in double the amount.

A distinctive feature of Article 214 of the Criminal Code of the Republic of Kazakhstan from Article 171 of the Criminal Code of the Russian Federation is the presence in the disposition of Article 214, in addition to the concept of illegal entrepreneurship, of such terms as “illegal banking, microfinance, and debt collection activities.” In the Criminal Code of the Russian Federation, there is a separate Article 172 dedicated to illegal banking activities, according to which criminal liability arises in cases of conducting banking operations without registration or special permission (license) in cases where such permission (license) is mandatory, if this act caused significant damage to individuals, organizations, or the state or is associated with the extraction of income in a large amount.

If we consider the criminal legislation of Ukraine and Belarus, changes have been made to the wording of the legal norm of the criminal law of these states. Thus, if in the past Article 233 of the Criminal Code of the Republic of Belarus was also identical to Article 171 of the Criminal Code of the Russian Federation and provided for liability for lack of registration, then today this article establishes liability for entrepreneurial activity only without a license (Criminal Code of the Republic of Belarus, 1999).

As for Ukraine, the elements provided for in Article 202 “Violation of the order of engaging in economic and banking activities”, and Article 203 “Engaging in prohibited types of economic activities” were decriminalized in the Criminal Code of Ukraine in 2012, as part of the liberalization of responsibility in economic and service activities, transferring the elements to the category of administrative offenses (Criminal Code of Ukraine, 2020). A similar path was also observed in Kyrgyzstan (Criminal Code of the Kyrgyz Republic, 2021).

In foreign countries, criminal legislation significantly differs from the legislation of former Soviet Union states. The main difference is that criminal legislation does not contain criminal law norms that establish criminal liability for violation of registration and licensing procedures of entrepreneurial activity. Criminal liability is mainly imposed on persons engaged in initially prohibited activities for all economic entities (such as human trafficking) or activities that are an exclusive monopoly of the state or for objects of increased danger. These norms are mainly enshrined in the legislation of European countries, such as Spain, France, Sweden, the Federal Republic of Germany, and Austria.

The legislation of the Kingdom of Spain provides that if a person wishes to engage in business, they must first obtain the status of an individual entrepreneur or establish their own personal company. As for the term “illegal entrepreneurial activity,” Spanish lawyers perceive it as an activity that is related to illegal goods and services. These include human trafficking, drug trafficking, etc.

Normative legal acts of Spain establish certain types of activities that require licensing. In the absence of a special license, the authorities of Spain consider such activities as administrative offenses. The punishment is either the cessation of the company’s activities or a fine. If the activity poses a real threat, the company is subject to a hearing procedure (Spain’s Criminal Code, 1998).

Because of analyzing the legislation of the Kingdom of Spain, it can be concluded that if a person has not registered their business and the business can be carried out without a special license, no responsibility is imposed on them. The most important thing is to pay all taxes on time. An interesting fact is that in Spain, one can register their business within one day, and the procedure costs 100 euros.

In the legislation of the French Republic, it is established that individuals who evade registration in the trade and companies register are subject to criminal liability. The state controls the activities of business entities in accordance with this register. The Ordinance No. 58-1352 of December 27, 1958, provided for criminal liability for evading registration. Currently, the provisions of this ordinance have been amended and supplemented by the norms established in Article L.123 of the Commercial Code and Decree No. 84-406 of May 30, 1984. However, criminal liability arises not for evading registration in the trade and companies register, but for failure, without valid reasons, to file an application for registration within 15 days of a judge of the commercial court who monitors the register. This offense is punishable by a fine of 750 euros. In the case of a repeat offense, the offender may be sentenced to imprisonment for up to six months and/or a fine of 4,500 euros (French Criminal Code, 2000).

It should also be noted that in the legislation of France, for certain types of activities, in addition to registration in the trade and company register, there are also special requirements that must be met. For example, opening a pharmacy without the appropriate license according to the Public Health Code is punishable by a fine of 3,750 euros, and in case of a repeat offense, imprisonment for up to

three months and/or a fine of 7,500 euros (French Public Health Code, 2010).

US criminal law does not provide regulations prohibiting engaging in entrepreneurial activity without proper registration. The Criminal Code explicitly defines actions for which one can be held responsible. For example, articles 542-548 regulate responsibility for illegal acts committed in the field of customs clearance of goods, such as importing goods under knowingly false documents, smuggling, concealing or destroying invoices, or other documents.

Also, the legislation of the United States provides for articles establishing the responsibility of persons evading tax payments. According to section 1027 of the US Criminal Code, if false statements were made or if an employer concealed documents necessary for accounting for employees in accordance with the law on employee pension benefits, the employer may be subject to criminal liability. This offense is punishable by a fine or imprisonment for up to 5 years (US Code).

The United States of America is a country consisting of 50 states. This feature is also reflected in its regulatory and legal acts. For instance, criminal responsibility for certain types of crimes is established at the level of individual states. However, despite this feature, criminal responsibility for unregistered entrepreneurial activity is not provided in any state. Nevertheless, some states have established in their criminal law the liability for conducting business without a special license. For example, in the southeastern United States, in the state of Virginia, it is a crime to enter into contracts or participate in bidding for the construction, repair, or improvement of real estate without a license or certificate, as well as without the license of the appropriate class (Virginia Criminal Code, 1950).

The institution of licensing is one of the peculiarities of the legislative framework of the United States. The expediency of its existence has been a controversial issue for a long time. Supporters of this institution claim that a license acts as a guarantee of the services provided. Whereas opponents believe that licensing requirements are only the result of lobbying by educational centers that earn money from issuing licenses.

At the same time, it is often an individual rather than a company that obtains a license. For example, N. Nelson notes, “if you need a general contractor’s license, you must prove that you are competent in your profession and pass an exam. Your state licensing board will also want to know your experience, competence in construction, criminal

history, and financial status.” However, she also points out the possibility of not forming an LLC and working under a pseudonym or trade name (Nelson 2015).

Thus, it can be stated that in the United States, entrepreneurial activity without registration does not constitute a criminal offense, if the citizen pays taxes and established fees for employees, as well as has all necessary licenses for work.

Analyzing the norms regulating criminal liability in the field of illegal entrepreneurship, it can be concluded that the legislation of the United States and Europe is similar. Individuals are held criminally liable not for the absence of registration for engaging in entrepreneurial activity, but for certain illegal actions during the course of such activity. Such actions may include tax evasion, working without a license, and causing harm to citizens.

A.V. Zarubin notes that in these countries, entrepreneurial activity has always been considered an important part of the economy, which is why the legislature built criminal and legal protection based on this position. That is, liability arises through the application of general norms on crimes in the field of economic activity (Zarubin 2018: 11).

The Baltic States, which were once part of the Soviet Union, have a criminal justice policy towards entrepreneurship that differs from that of some other former Soviet republics. These countries have undergone legislative reforms in criminal and administrative law, which have resulted in the adoption of a European approach to the criminalization of illegal entrepreneurship.

In Article 372 of the Penal Code of the Republic of Estonia, the legislator has established that economic activities carried out without a license or engaging in prohibited economic activities are considered to be offenses. However, there is no independent provision in the penal code that establishes criminal liability for conducting entrepreneurial activities without registration (Penal Code, 2001).

Now let’s turn to the criminal legislation of the People’s Republic of China. It is worth noting that the state regulation of entrepreneurship in China is well developed, given the significant role entrepreneurship plays in the country’s economy. Therefore, the criminal legislation of this state regulating liability for illegal entrepreneurship understandably meets the requirements of the economic system of this state (Criminal Code of the PRC 1997).

Article 225 of the Criminal Code of the People’s Republic of China provides for liability for actions

related to destabilizing the market. The text of the article specifies that the offense is characterized by four forms of criminal activity:

1) engaging in business activities without a license, involving goods subject to monopoly by law and administrative regulations, as well as other goods subject to trade restrictions;

2) buying and selling export-import licenses required for exporting and importing, certificates of origin of goods, as well as other business licenses and permits defined by law and administrative regulations;

3) engaging in securities activities in violation of legislative provisions, futures or insurance without the sanction of the corresponding competent state authorities;

4) engaging in other illegal business activities that have a destabilizing effect on the market.

This article places the main emphasis not on the violation of registration and licensing rules for business activities, but on the ability of such activities to destabilize the market. Banking activity is a special type of entrepreneurial activity. At all historical stages, banks have acted as intermediaries in society, engaged in the redistribution of vast financial flows. Hence, there is a direct correlation between banking activity and the state of the national economy.

As of today, banks are the main institution and key element in the entire credit system of the state, ensuring not only the development of the economy but also guaranteeing social stability in society. It is precisely because of the crucial role of banks that the state attaches great importance to protecting banking activities.

The main danger in crimes committed in the banking sphere is the creation of a negative image of state institutions that supervise and control the activities of banks. As a result, citizens lose trust in credit and financial organizations, and consequently refuse to keep their money in banks. This leads to a crisis in the entire banking system, as banks cannot function properly without the corresponding financial resources.

Taking into account the importance of the normal functioning of the banking system for the entire economy of the country, the legislator applies a comprehensive approach to the legal regulation of criminal liability for illegal banking activities.

In Kazakhstan, criminal liability for illegal banking activities is provided for in Article 214 of the Criminal Code of the Republic of Kazakhstan, together with illegal entrepreneurial activities,

microfinance or collection activities (Criminal Code of the Republic of Kazakhstan, 2014).

The Criminal Code of the Russian Federation provides for a separate article, namely Article 172, regulating criminal liability. The provision of this article is identical to Article 214 of the Criminal Code of the Republic of Kazakhstan.

In foreign countries, criminal liability for illegal banking activities differs significantly from that in the former Soviet Union countries. Throughout the existence of this institution, regulations governing liability for violations of banking operations have constantly changed. This is primarily due to a different approach to the banking system, the use of various new financial instruments, and therefore, more sophisticated forms of fraud emerge in this context.

Today, there are two opinions in foreign countries regarding the prosecution of individuals for criminal liability for illegal banking activities. Countries such as France, Germany, England, Finland, and the United States consider illegal banking activities to be a form of fraud in their criminal codes. While other countries, such as Bulgaria and China, have a separate special article in their criminal code that regulates liability for violating the rules of any licensed activity without a license.

Countries such as the United States, India, France, and China hold not only individuals but also legal entities criminally liable for illegal banking activities.

In the legislation of the Commonwealth of Independent States countries, you will not always find an independent norm regulating criminal liability for illegal banking activities. However, despite this absence, it is compensated by general norms that provide for liability for engaging in any licensed activity or liability arises from norms providing for liability for violating the order of entrepreneurial activity. This is characteristic of countries such as Ukraine, Azerbaijan, and Moldova.

The punishment for this type of crime is usually a fine, arrest, or imprisonment. In addition, some Criminal Codes of CIS countries apply the following types of punishments:

Deprivation of the right to hold certain positions or engage in certain activities (Criminal Codes of the Republic of Uzbekistan, the Republic of Belarus, Ukraine, and Armenia);

Correctional labor (Criminal Codes of the Republic of Uzbekistan, the Republic of Kazakhstan, and Armenia);

Restriction of freedom (Criminal Codes of the Azerbaijan Republic, Armenia, and the Republic of Belarus);

Restriction of freedom with deprivation of the right to hold certain positions or engage in certain activities (Criminal Codes of Ukraine and Armenia);

Confiscation of property (Criminal Code of Armenia).

As a result of the analysis of foreign legislation, it can be concluded that the fundamental difference between the legislation of distant foreign countries and the legislation of Kazakhstan and many post-Soviet states is the absence of a general norm of law that would establish criminal responsibility for conducting entrepreneurial activities without state registration or a license. Many scholars identify two main reasons for the absence of this norm in foreign countries:

Firstly, the system of criminal legislation in distant foreign countries includes not only the Criminal Code but also various branch normative legal acts that also provide for responsibility in case of violation of established rules for conducting entrepreneurial activities.

Secondly, business in developed capitalist countries is based on centuries-old traditions of entrepreneurial activity. Moreover, individuals engaged in this activity significantly differ in their level of legal culture and legal consciousness. Entrepreneurs themselves are interested in conducting business in accordance with the law and creating healthy competition.

Conclusion

Taking into account the aforementioned differences from the legislation of Kazakhstan and post-Soviet countries, it can be concluded that the legislator of foreign countries does not consider illegal entrepreneurship as a widespread negative social phenomenon.

As for criminal liability for illegal banking activities, there are also some differences between the legislation of foreign countries and post-Soviet countries.

Thus, in foreign countries, there are two views on illegal banking activities:

Firstly, illegal banking activities are considered a type of fraud, and criminal liability arises under the Criminal Code for this offense.

Given the above differences from the legislation of Kazakhstan and other post-Soviet countries, it can be concluded that the legislators of foreign countries do not consider illegal entrepreneurship as a large-scale negative social phenomenon. As for criminal liability for illegal banking activities, there are also some differences between the legislation of foreign countries and post-Soviet countries. Thus, in foreign countries, there are two views on illegal banking activities:

The first is that illegal banking activities are a type of fraud, and criminal liability is established under the relevant article of the Criminal Code.

The second is that criminal liability for illegal banking activities is enshrined in a separate article of the criminal law, providing for responsibility for violating the rules of conducting any activity that requires a special license.

As a result of analyzing the legislation of the CIS countries, it is also possible to identify that views on liability for illegal banking activities are not similar. Thus, in the legislation of some states, there is no separate norm regulating criminal liability for illegal banking activities. In this case, liability arises either under a general norm providing for liability for engaging in any type of activity requiring licensing or under norms providing for liability for violating the procedure for conducting entrepreneurial activities. While in other states, the Criminal Code includes a separate article devoted to illegal banking activities.

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