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Contrast of unfair trade practices in business-to-business relationships in the agricultural and food supply chain: An overview from the vitivinicultural perspective

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Abstract. According the Directive EU 2019/633, European Union settled a minimum harmonised framework of rules to ensure the prohibitions of unfair commercial practices in business to business relationship of agrifood sector. The bans on unfair trade practices were adopted because it is well known that significant imbalances in bargaining power are quite frequent between suppliers and buyers of agricultural and food products. Such practices may, for example impose a significant imbalance of rights and obligations on one trading partner and are likely to have a negative impact on the living standards of the agricultural community. The paper analyses the Directive, some national implementing measures and some possible future evolutions of these rules from the perspective of the vitivinicultural sector considering the different actors of the value chain from the vineyard to the distribution of bottles (retailers or food caterers). The paper would approach these measures as an example of how governments can favour value chains and resilient business model.

1. Importance of better functioning of agri-food chain

The Directive (EU) 2019/633 concerning unfair trading practices in business-to-business relationships in the agricultural and food supply chain was adopted by the European Parliament and the European Council on April 17, 2019, to reduce the occurrence of unfair commercial practices in business-to-business relationships in the agricultural and food supply chain and, consequently, their negative impact on the living standards of the agricultural community. The Directive established a minimum harmonisation approach to allow EU member States to adopt or maintain national rules which go beyond the Directive.

Unfair commercial practices are practices that deviate from good commercial conduct, are contrary to good faith and fair dealing. They are unilaterally imposed by one trading partner on the other, imposing an unjustified and disproportionate transfer of economic risk from one trading partner to another or imposing a significant imbalance of rights and obligations on one trading partner.

While business risk is intrinsic in all economic activities, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes and its exposure to weather conditions. That uncertainty is compounded by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal.

The need for a reflection at EU level on the importance of a better functioning of the agri-food chain started after the 2003 reform of the Common Agricultural Policy (CAP) (known as the Fischler's reform), which provided for the overall dismantling of a solid guarantee system of intervention in agricultural markets and for the market orientation. The dismantling of these intervention systems have, in concrete terms, brought out to a greater extent the existing imbalance in the agro-food chain, where the actors of agricultural production, no longer sufficiently guaranteed by financial support, have found themselves having to deal with an increasingly free market in a position of weakness with respect to more organised counterparts with greater contractual power. The asymmetry of the agri-food supply chain is also exacerbated by the fact that most companies are small or medium-sized with a much higher concentration in the food processing and retail sectors than in the agricultural sector.

The European Commission started to address this issue in 2009 with its Communication on a better functioning food supply chain in Europe. In 2011, the Commission established the High Level Forum for a Better Functioning Food Supply Chain. The European Parliament also took up the matter and in its resolution of 7 June 2016 called on the Commission to present a proposal for an EU legal framework on unfair trading practices. Lastly, the European Council, in its conclusions adopted on 12 December 2016, called on the Commission to propose a legal framework to tackle unfair trading practices. This legal framework finally found its fulfilment in Directive (EU) No 2019/633 of the Parliament and of the Council of 17 April 2019 on unfair commercial practices (henceforth "the Directive").

1.1. Content of the directive

The Directive was an important milestone in affirming the principle of contrasting unfair commercial practices at EU market level, in order to reduce their frequency, and in establishing a common minimum level of protection against 16 practices which were identified as the most problematic. The Directive involves Business to Business (B2B) relationships and does not concern the final consumer, whose protection is provided for in Directive (EU) 2005/29 concerning unfair Business to Consumer (B2C) commercial practices. The Directive provides for the protection for suppliers insofar as they sell agricultural and food products to purchasers who are larger in terms of turnover. This also applies to suppliers and buyers located outside the EU, provided one of the parties is located within the EU.

The Directive bans 16 unfair trading practices distinguishing between 'black' and 'grey' practices. Whereas black unfair trading practices are prohibited, whatever the circumstances, grey practices are allowed only if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner.

Permanently prohibited unfair commercial practices, known as the "black list", are considered as unfair by their very nature and should not be subject to the parties' contractual freedom:

- payments later than 30 days for perishable agricultural and food products;
- payment later than 60 days for other agri-food products;
- short-notice cancellations of perishable agri-food products;
- unilateral contract changes by the buyer;
- payments not related to a specific transaction;
- risk of loss and deterioration transferred to the supplier;
- refusal of a written confirmation of a supply agreement by the buyer, despite request from the supplier;
- misuse of trade secrets by the buyer;
- commercial retaliation by the buyer;
- transferring the costs of examining customer complaints to the supplier.

The "grey list" identifies unfair commercial practices that are prohibited unless previously agreed upon by the supplier and the purchaser:

- return of unsold products;
- payment of the supplier for stocking, display and listing;
- payment of the supplier for promotion;
- payment of the supplier for marketing;
- payment of the supplier for advertising;
- payment of the supplier for staff of the buyer, fitting out premises.

A grey practice is unfair only if it occurs after the transaction has started without having been agreed beforehand, in the supply agreement.

The Directive provides that EU member States shall ensure that the prohibitions laid down in black and grey lists constitute overriding mandatory provisions which are applicable to any situation falling within the scope of those prohibitions, irrespective of the law that would otherwise be applicable to the supply agreement between the parties.

It should be noted that, at the same time, most EU member States had adopted their own legislation on unfair practices at national level.

In order to make the provisions of the Directive effective, article 6 required EU member States to designate national law enforcement authorities (EAs) and, in article 8, to cooperate effectively with each other and with the European Commission and to assist each other in investigations with a cross-border dimension. The scope of application of the Directive lies within the objectives of the Common Agricultural Policy (CAP), aimed in particular at ensuring a fair standard of living for the agricultural community pursuant to article 39 of the Treaty on the Functioning of the European Union (TFEU). Such legal framework allows, in particular, agricultural policy to take precedence over competition rules [1].

The latest CAP reform (Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021) puts at the centre the principles of environmental, economic and social sustainability of the agri-food supply chains. In this way it reaffirmed the importance of leading the European agricultural food system into an ecological, fair and socially balanced transition to foster resilience and sustainability while guaranteeing European food sovereignty. In this context, combating unfair practices is considered an instrument to enhance the protection of agricultural producers who, while playing a key role in environmental sustainability, are vulnerable to unfair trade practices that threaten their economic sustainability and thus their very existence.

1.2. National rules transposing the directive

When transposing the Directive into their national law, EU countries could not offer less protection than that foreseen by the Directive, on the contrary, they could choose to be stricter than the Directive and go beyond its scope.

The EU Commission published some reports on the state of the transposition and implementation of the Directive in April 2024 that provide insights into the transposition choices of all 27 EU member States [2, 3].

In particular some EU countries introduced stricter national rules according to article 9 of the Directive, to ensure a higher level of protection, provided they are compatible with the rules on the functioning of the internal market.

Some States choose to introduce the obligation of written contracts in coherence with one of the aim of the Directive that is enhancing the use of fair and transparent agreements between parties.

This kind of approach was adopted, among others, by Italy, France and Spain and recall the provision of CAP regulation (article 168) which lets faculty to EU member States to introduce written contract systems to assure clear and transparent transaction of agricultural products (including grapes and wine). In particular, in Italy the legislative decree no. 198/2021 transposes Directive (EU) 2019/633 and states that any contract shall: be made in advance of the delivery; be made in writing and include, in particular, 5 elements: (i) the duration of the contract, (ii) the quantity and quality of the products concerned, (iii) the price payable for the delivery, which shall be static and be set out in the contract or be calculated by combining various factors set out in the contract, (iv) arrangements for collecting or delivering the agricultural products and (v) details regarding payment procedures.

Moreover, as a general clause, Italian decree states that sales contracts must: i) be informed by principles of transparency, fairness, proportionality and reciprocity of the performances with reference to the goods supplied and ii) take into account the production costs borne by the operator when setting the prices of the goods supplied.

In Spain the Ley 12/2013 (concerning measures to improve the functioning of the food chain) provides the obligation for the buyer of registering the written contracts in the electronic register managed and verified by the Competent authority (AICA).

In some cases stricter rules can concern a stricter scope as in the case of Italy where the Legislative Decree 198/2021 establishes, first of all, the extension of the scope to supplies of agricultural products and foodstuffs carried out in the national territory, regardless of the turnover of suppliers and buyers.

Stricter rules can also concern practices that go beyond the 16 practices of the Directive. For example five States introduced the prohibition to sell or buy below production costs, to re-sell at a loss or below purchase price or other obligation to respect a certain price level. “Sales or purchases below cost” and “re-sale at a loss” are not specifically governed by the Directive or the Common Market Organisation (CMO) Regulation. It’s the case of the Spanish Law transposing the Directive, that at article 12b.1 foresees that, in order to avoid the destruction of value in the food supply chain, each operator shall pay the next operator upstream a price equal to or higher than the cost of production of that product actually incurred or borne by that operator.

The current Italian legislative decree, in its perspective, at article 5(1)(b), prohibits the unfair practice the “imposition of excessively burdensome contractual conditions on the seller, including that of selling agricultural and food products at prices below production costs.” In this case, it is precisely the aspect of imposition that appears to be the key element in the violation of the Italian rule. In essence, the setting of the price below the cost of production does not currently integrate in itself a disproportion capable of qualifying the practice as unfair, but provides that it must be verified on the level of the existence of a specific abuse: the buyer imposes the determination of the value of the product below the threshold of minimum remuneration by taking advantage of the position of supremacy held in the chain or by being aware of the divergence in value and concludes the contract to take advantage of the supplement of his own profit [4].

In support of production cost forecasting, transparency of markets and existing relationships between supply chain actors in the context of buying and selling agricultural and food products, the Enforcement Authority (ICQRF) in collaboration with ISMEA (Institute of services for the agricultural food market) publishes monthly economic monitoring reports and data illustrating the evolution of input prices, direct costs and consumer prices in a selection of supply chains of strategic importance in the national scenario.

The monitoring of average production costs was initiated by ISMEA with the aim of estimating the cost incurred by an entrepreneur in the production of an agricultural product in an ordinary condition, being aware of the high heterogeneity that characterizes the agricultural sector both in terms of context conditions, agronomic techniques and management choices.

In order to ensure its usability, the observation of phenomena is implemented in such a way as to ensure:

- representativeness at the geographical level and of production systems;
- reliability and simplicity, given the need for updating and the broad spectrum of analysis;
- economic, organizational, managerial and technological sustainability;

- timeliness of updating (monthly/annually) capable of meeting the purposes of the regulatory environment.

2. Grape and vine sector

In the preamble, the Directive explicitly considers that grapes and must for wine production have special characteristics, because grapes are harvested only during a very limited period of the year, but are used to produce wine which in some cases will only be sold many years later. Taking into account this special situation, producer organisations and interbranch organisations in the past developed standard contracts for the supply of such products. Such standard contracts are used by suppliers and buyers for multiannual arrangements and provide for specific payment deadlines with instalments. Such contracts had double effect: not only they advantage agricultural producers with the security of longstanding sales relations, but also contribute to the stability of the supply chain. Where such standard contracts have been drawn up by a recognised producer organisation, interbranch organisation or association of producer organisations before 1 January 2019, the late payment provisions laid down in this Directive shall not apply to such contracts between suppliers of grapes and must for wine production and their direct buyers.

Concerning Italy, at the moment such specific exemption does not find any application as it happened that contracts of that kind where challenged by Antitrust Authority because of the aspect of offer regulation, so that they were progressively dismissed. Nowadays a draft project of CAP reform could try to better clarify the possibility of producers of regulating offer and other contractual aspect of agricultural producers.

With regard to the profile of price payable for grapes (for wine use), it is necessary to consider that in this sector the actual value of grapes and the consequent real determination of the price are realized, in general, not always at the moment of the deliver but also at a later stage, that is, at the moment when winemaking is completed and the obtained wine market value is defined. Examples are grapes for PDO or PGI wines, for organic wines or for certified productions (sustainable wines). In view of the above, it might be advantageous for vine growers to include in contracts all the elements useful for qualifying the grapes and set a “price to be calculated” at a later time that is also agreed upon. Therefore, it is necessary that the quality requirements to be met are provided and specific factors defined, in order to be able to define later, in a clear and objective way, the final value, at the time when (e.g.) the wines are quoted on the sectorial exchanges at the beginning of the year.

With the aim of correctly valorising the grapes on the basis of value of corresponding wine, it seems useful not to fix a static price but a price that would be calculated by combining various factors set out in the contract, which may include objective indicators, indices and methods of calculation of the final price. These indicators have to be easily accessible and comprehensible and they should reflect changes in market conditions, the quantities delivered and the quality or composition of the agricultural products delivered. Such indicators may be based on relevant prices, production and market costs. To that effect, States may determine indicators, in accordance with objective criteria based on studies carried out on production and the food supply chain; the parties to the contracts are free to refer to these indicators or any other indicators which they deem relevant.

With regard to the setting of the relevant prices, it is essential, for clarity and transparency between the parties, to refer to objective conditions that are the result of specific and technical evaluations, accepted by the most representative professional organizations or referred to values expressed by competent third-party bodies (through weekly lists, by chambers of commerce, by sectorial commodity exchanges, etc.).

Another aspects that can be of interest for the vine and wine sector is that the Directive considers that late payments for agricultural and food products and short notice cancellations of orders of perishable products are prohibited as they impact negatively on the economic viability of the supplier, without providing off-setting benefits. Thus the Directive provides for a definition of perishable agricultural and food products that strictly relates to its objectives that differ from health and food safety objectives. A product is considered perishable if it can be expected to become unfit for sale within 30 days from the last act of harvesting, production or processing by the supplier, regardless of whether the product is further processed after sale. Perishable products are normally used or sold quickly and grapes for wine production completely fit with such definition of perishable products. For this reason, in general, payments for perishable products that are made later than 30 days after delivery or 30 days after the date on which the amount payable is set, are considered not compatible with fair trading. It is important to notice that in the case that it is agreed between the parties that the determination of the price would be made e.g. at the 1st of March of the following year, taking into account an added value calculated according with the average quotation of January and February, the term of payment of 30 days will start from that date that is when the final price is determined (in the example this date would correspond to March 1st). Both parts would gain in principle benefits from this compromise, more value gained for the seller and more liquidity for the buyer.

On the other hand in order to provide increased protection to all producers and their liquidity, for not perishable products (e.g. wine), suppliers shall not wait for payment longer than 60 days after delivery or 60 days after the date on which the amount payable is set.

Concerning the field of application, the Directive considers that the limitations about the delay of payments should only apply to payments related to the sale of agricultural and food products, and not to other payments such as supplementary payments by a cooperative to its members. The Italian decree, in particular, recognises the added value of cooperative organisations in which the value chain is the main scope, so it exempts cooperatives from making written contracts with reference to the deliveries among the members of the cooperatives and the cooperative (contributions). In particular, deliveries made by members, in the form of contribution within the cooperative, do not in any case constitute a sales transaction and it responds to the own structure of the cooperative and, as such, is governed by the cooperative's bylaws and relevant regulations. Conversely, it is possible that certain payments made by the cooperative to its members constitute sales and therefore fall within the scope of the directive (e.g., deliveries not subject to statutory obligations). In light of the foregoing, the Italian legislative decree does not exclude cooperatives from the scope of application in its entirety and allows the enforcement authority to conduct a case-by-case analysis of specific transactions conducted within a cooperative (e.g., certain payments made by cooperatives to their members that are outside the scope of deliveries and represent sales) in order to determine the applicability of the national provisions against unfair trade practices.

Obviously this exemption rule does not apply to all contracts concluded among the members the cooperatives or the cooperative with suppliers or buyers that are not members of the cooperatives. It is worth to mention that in Italy a big part of the production of wine is made by wine cooperatives that transform grapes delivered by their vine growers members.

3. The enforcement and first results of controls against unfair trade practices

Each EU country has designated one or more authorities to enforce the prohibitions of unfair trade practices at national level. These enforcement authorities (EAs) have the power to both launch investigations and fine operators who break the rules. The objective is to protect suppliers of agricultural and food products in their negotiations with purchasers, in order to counteract the imbalance in contractual power. The activities to tackle unfair commercial practices are carried out by the Enforcement Authorities (EAs) on their own initiative or upon complaint by any interested party, including producer organizations, supplier organizations, and their respective associations, as well as organizations with a qualified interest.

The national law enforcement authorities have the following powers:

– investigatory and monitoring powers;
– the power to take decisions when an infringement has occurred;
– the power to require the buyer to end the prohibited trading practice;
– the power to impose, or initiate proceedings to impose fines and other equally effective penalties and interim measures addressed to the author of the infringement, in line with national rules and procedures and the power to publish the decisions taken.

All EU member States have chosen administrative authorities:

– eleven States designated a competition authority;
– six to a food market authority (e.g. Spain designated AICA, that is the Food Information and Control Agency created in 2013 for tackling unfair trade practices of agri-food sector);
– five to their Ministry of Agriculture (e.g. Italy designated the Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-food Products, ICQRF, that is the competent authority engaged in food controls within the Agricultural Ministry);
– two to an authority in charge of combating unfair commercial practices in the agri-food sector;
– two to a government body within the Ministry of Economy and Finance (e.g. France designated the DGCCRF, that is the General Directorate for Competition policy, Consumer Affairs and Fraud Control);
– one to an authority for consumers and markets.

The Directive has been adopted in 2019, however EU States had time to implement the directive in the national law till 2021. The overall data on EU member states' enforcement activities in 2022 and 2023 [2] showed that the most frequently detected unfair commercial practices were late payments for perishable (after 30 days) or non-perishable (after 60 days) agricultural and food products (50% and 13%), payments not related to a specific transaction (7%), payments requested from the supplier for marketing actions (7%) as well as for stocking, displaying and listing (7%). About 41% of the unfair commercial practices detected had been identified at retail level (47% in 2022), 36% at the level of processing (27% in 2022) and 22% at the level of wholesale (25% in 2022).

In 2022, over 80% of own initiative (ex officio) cases and investigations indicated below refer to Spain only. In 2023, around 75% of own initiative cases and investigations indicated below refer to Spain only. To understand this data it is worth to underline that Spanish EA (AICA) has been created by Ley 12/2013 to be exclusively devoted to the contrast to unfair trading practices in agri-food sector, so that probably it is the EA with the most consolidated experience.

In some cases, there is a correlation between a higher number of guidance cases and a smaller number of complaints. The differences in the number of the cases may also depend on the internal rules of enforcement authorities.

In 2023, out of the EUR 22 million of the total amount of fines for the number of detected infringements, EUR 20 million amount to Poland only. In 2022 the total amount of fines for the number of detected infringements EUR 15.1 million.

From the latest available AICA report, it results that, in 2023, AICA made a total of 2.371 controls on commercial relationship, the first sector was wine sector (with 894 controls) followed by dairy sector, fruit and vegetable sector. Among these ex officio controls, 96 unfair trade practices have been detected in the vitivinicultural sector. The unfair trade practices, in decreasing order, have been:

late payments (42, over 75% at the level of processing, and nearly 25% at the level of wholesale), lack of elements of the contracts (25, most at the level of processing), lack of contracts (13, mainly at the level of processing), unilateral changes (12 cases, all at level of processing). Concerning complaints, 210 were received and 30 of them were referred to the wine sector, and they brought to 23 sanctions on the total of 130 sanctions for all sector.

In France, the Enforcement Authority deals with the contrast of unfair practices that has been integrated in the Code of Commerce. The French Code du Commerce deals with legislation that governs business practices, defines the rules of the economic game and protects the interests of the various business players in all sectors (non only agri-food sector) and incorporates the fundamental principles of competition law, designed to guarantee free and undistorted competition in the marketplace. These provisions aim to maintain a healthy and dynamic competitive environment, favourable to innovation and consumer welfare. From the latest available French report of DGCCRF it is not possible to extrapolate the specific activity that have been made in wine sector.

In Italy the provisions of Directive (EU) No. 2019/633 of April 17, 2019 on unfair trade practices, were implemented with Legislative Decree no. 198/2021, and the ICQRF, was designated as the national law enforcement authority in charge of the detection of violations and the imposition of related penalties for unfair trade practices in the agri-food chain.

Concerning the results in Italy, it is worth to recall that ICQRF is the most important agri-food control body at national level, one of the more important at European level and one of the first in the world in terms of quality and number of controls [5]. The ICQRF relies on the in-depth technical multidisciplinary knowledge of the agri-food sector and the daily work of its inspectors, who are spread throughout the country, to maintain the safety and reputation of Italian agri-food products, thus contributing to the credibility and competitiveness of the sector. Initiative activities (ex officio controls) are annually planned according to a risk analysis, in particular preliminary economic analysis and economic scenario that determine the identification of specific risk parameters. ICQRF has been implementing activities of controls for the contrast of unfair trade practice since June 2022.

In particular, following the risk analysis, the highest number of controls made by ICQRF against unfair trade practices concerned dairy and fruit and vegetable sector.

The 2024 operational results confirm the ICQRF's position among the world's leading anti-fraud authorities for agribusiness: ICQRF performed nearly 55.000 controls in the agri-food sector including the controls of the fairness of more than 800 commercial relationships. In 2024, the ICQRF issued a total of 2.381 payment injunctions, amounting to more than 8 million euros. Of these, 26 (corresponding to 1 % of the total) were issued in the area of countering unfair practices amounting to more than 650.000 euros (corresponding to 8.1 % of the total).

According to the available report of activities contrasting unfair trade practices, in 2022, 76 operators has been verified, 3 of these operators belong to wine sector and no illicit practice was detected. In 2023, a total of 354 operators have been verified in the field of unfair trade practices, 4 of these operators belong to the wine sector and 2 of them resulted responsible of different infractions (the lack of contracts for the selling of bottled wine, late payment of grapes by a winery, lack of elements of the contracts in both cases).

In 2024, for unfair trade practices contrast, 325 operators has been verified, 4 of these operators belong to wine sector and resulted in the detection of 2 unfair trade practices by wineries related to late payments of grapes and lack of some elements of the contracts. From 2022 to 2024 a total of twenty-five complaints have been received by ICQRF referring unfair trade practices concerning dairy, fruit and vegetables sector and meat sector.

4. Conclusions and perspectives

The Directive (EU) 2019/633 have been inspired in part by the need to provide, as far as possible, for a better and more balanced functioning within the agri-food chain. In the strategic dialogue document of 2024 [6], the European Commission stressed that the position of farmers in the value chain must be strengthened by encouraging them to join cooperatives and/or associations to reduce costs, increase efficiency and improve market prices. The CAP is already supporting farmers in this regard however, at the end of 2024, targeted amendments were proposed to the current Regulation establishing a common market organisation of agricultural products (CMO) for strengthening the producers' position in the negotiation and conclusion of contracts and farmers' position against unfair trading practices also through the proposal of a regulation on cross-border enforcement against unfair trading practices.

Moreover, in February 2025 the European Commission made a communication on its vision for agriculture and food that could shape together an attractive farming and agri-food sector for future generations [7]. The document describes the need to develop a set of policy responses for a prosperous agri-food sector in order to achieve an attractive sector that guarantees a fair standard of living for the agricultural population, as enshrined in article 39 TFEU. One of the stated objectives of the EU Commission is therefore to achieve a fair and equitable food supply chain. First and foremost, farmers must get a better income from the market so that they can make the necessary investments and make their farms more resilient. A precondition for this is that the current imbalances in the food supply chain, where unequal distribution of revenues, risks and cost burdens often disproportionately affect primary producers, are corrected. In one passage, the Commission emphasised that "practices where farmers are systematically forced to sell below cost will not be tolerated".

In particular, the Commission recognises that several EU member States have resorted to national rules to address the issue of obtaining prices that not even cover the production cost, which may however lead to a diversity of approaches in the single market. On this basis, the Commission has stated that it will propose further initiatives, in particular “the revision of the Unfair Commercial Practices Directive to affirm the principle that farmers should not be forced to systematically sell products below the cost of production, as well as the revision of the Common Market Organisation regulation in the context of the post-2027 CAP proposals”.

A key element identified by the Commission to foster trust and fairness is transparency about how costs and margins are formed and shared in the food supply chain. It seems of pivotal importance to improve transparency along the food supply chain also through the new EU Agrifood Supply Chain Observatory (AFCO), which will develop and publish indicators on price formation in the food supply chain to guide further action. These tools should also support the long-term competitiveness of small and medium enterprises in the food and drink sector.

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