



## **Conditions for free movement: more protection of workers and fair competition**

**Resolution adopted by the Steering Committee of the ETUC  
Brussels, 28 April 2009 (SC. 127)**

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### **Introduction**

- 1) On the occasion of the enlargement of 1 May 2004, 12 of 15 'old' Member States introduced transitional measures, whereas some new Member States applied measures on the basis of reciprocity as a response. Before 1 May 2009 the Council will have to review the functioning of the transitional provisions on the basis of a Commission report. This report was published in November 2008<sup>1</sup>.

In the meantime, the situation has considerably changed. Not only have Romania and Bulgaria entered the EU, with separate timetables for possible transitional measures<sup>2</sup>. Also, a financial and economic crisis of almost unprecedented scope is sweeping over the world, and does not leave the EU and its expanding internal market and labour markets untouched.

ETUC wants to contribute to the debate about the next steps with this resolution.

- 2) This resolution is built on previous positions taken on the subject matter, notably the 2005 Resolution "Towards free movement of workers in an enlarged European Union"<sup>3</sup> and the 2008 "ETUC response to ECJ judgements Viking and Laval"<sup>4</sup>. It does not deal with all issues discussed in those documents, some of which will be addressed in the near future separately (such as: developing a proactive litigation strategy on collective action, and coordinating collective bargaining strategies with regard to the extra-territorial effects of collective agreements).

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<sup>1</sup> In the meantime, only 5 'old' Member States still have transitional restrictions in place (B, DK, D and A), and one new Member State still has reciprocal measures in place (H).

<sup>2</sup> At the moment, there are still 10 Member States that have transitional restrictions in place for Romania and Bulgaria.

<sup>3</sup> <http://www.etuc.org/a/1898>

<sup>4</sup> <http://www.etuc.org/a/4704>

- 3) ETUC wants to stress that proper consultation of the social partners at all relevant levels about the functioning and the future of the free movement provisions and transitional measures is indispensable, and urges the Commission once again to convey this message to Member States.

### **Executive summary**

- 4) Before 1 May 2009, the Council will have to review the functioning of transitional measures in an enlarged Europe. The ETUC takes this opportunity to renew its calls for a fair internal market, combining open borders with adequate protection for workers. With this Resolution, the ETUC updates its position on the conditions for free movement, having regard in particular to the rise of protectionism, and the potential increase in nationalism and xenophobia, in the context of the economic and financial crisis, and the recent judgments of the European Court of Justice. The ETUC calls for the full implementation of the free movement principles in the context of fair competition. For this, it is essential that accompanying measures are in place both at national and European level.

- 5) In particular, the EU needs to clarify its legal framework with regard to the moving around of workers in the framework of the free movement of workers and services. The ETUC calls especially for:

- a. a Social Progress Protocol to be annexed to the Treaties to make absolutely clear that free movement must respect fundamental rights, and to embed this in the broader concept of social progress and the harmonising upwards of working conditions and social systems;
- b. Member States to address the weaknesses of their national systems which may lead to non-application of labour standards and unfair competition on wages and working conditions, and make their national systems 'mobility proof';
- c. the Directive on the Posting of workers to be revised with a view to restoring its primary objective: ensuring a climate of fair competition and respecting workers' rights.

Several issues need to be addressed, including in particular the legal base, the definition of a posted worker and of a transnational service, the possibility for Member States to include the protection of workers as a 'public policy' provision, and the respect of the role of trade unions in negotiating and enforcing collective agreements.

Special attention must also be paid to public procurement procedures, and the possibility for public authorities to introduce social clauses demanding the observance of the locally applicable collective agreement.

- 6) The ETUC also calls on its members to adapt their structures and actions to the needs and realities of migrant and mobile workers and invest in cross border solidarity.

### **Conditions for free movement**

- 7) The free movement of workers is a fundamental right enshrined in the EU Treaties, guaranteeing equal treatment and protection against discrimination on the basis of nationality. Therefore, according to the Treaty, transitional restrictions, as well as their continuation, should be justified on important and objective grounds.
- 8) However, the support for the unrestricted implementation of free movement provisions is currently undermined by the following developments:
  - a. the politics of deregulation and one-sided emphasis on 'flexibility' have led to increased numbers of workers in precarious jobs, as well as outsourcing and subcontracting. A general sense of insecurity, and fear for 'undercutting of wages and working conditions' by such practices is on the rise;
  - b. in many countries, insufficient measures have been taken to ensure that national social and industrial relations systems are 'mobility proof', leading to lack of enforcement of wages and working conditions and labour exploitation of migrant and mobile workers;
  - c. the cross border mobility of workers in the framework of 'services' (via subcontractors and intermediaries) is increasingly replacing the free movement of 'workers', leading to unfair competition on wages and working conditions;
  - d. in countries with transitional measures, these have not always had the intended effect of controlling inflows, but sometimes led to employing more migrant/mobile workers as undeclared workers and as (false) self employed.
- 9) In 2005, the ETUC therefore called urgently for a framework of firm and fair rules, to be developed both at national and EU level, to accompany the coming about of a genuine internal market, in which goods, capital, services and workers can move around to the benefit of citizens, economies and societies.

According to the ETUC, a European labour market requires European 'rules of the game', combining open borders with adequate protection.

These key conditions are:

- a. equal wages and working conditions for work of the same value on the same territory;
  - b. respect for national collective bargaining and industrial relations systems as indispensable and dynamic tools to manage change in a democratic way;
  - c. equal access of all workers to social benefits;
  - d. proper instruments and tools for monitoring, enforcement and application in practice for stakeholders at all relevant levels, including the social partners.
- 10) Since 2005, the ETUC has stressed on numerous occasions the importance and urgency of accompanying the increased mobility on the emerging European labour market(s) with appropriate policies and conditions, however, the European Commission and the Council have remained deaf and blind to this demand.
- 11) Four recent ECJ cases<sup>5</sup> have exposed the weaknesses of the current EU legal framework applicable to fundamental social rights and the free movement of workers and services.

They have created major social unrest and are endangering social partnership models.

- a. the ECJ confirmed a hierarchy of norms, with market freedoms highest in the hierarchy, and the fundamental social rights of collective bargaining and action in second place.
- b. the ECJ interpreted the Posting Directive (covering workers that cross the borders in the framework of services), in a very restrictive way, limiting the scope for trade unions to take action against 'social dumping'<sup>6</sup> and to guarantee equal treatment of local and migrant workers in the host country.

The ETUC consequently called for a **Social Progress Protocol**, to be attached to the Treaties, to make absolutely clear that all free movement provisions of the Treaty must be interpreted in a way which respects fundamental rights, and to embed this in the broader concept of social progress and the harmonizing upwards of working conditions and social systems.

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<sup>5</sup> Viking C-438/05; Laval C-341/05; Ruffert C-346/06; Commission v Luxembourg C-319/06. For summaries of the judgements, see: <http://www.etuc.org/r/846>

<sup>6</sup> 'social dumping' is unfair competition on wages and working conditions leading to a spiral downwards

As the new Lisbon Treaty (consolidated text) in its Article 3 (3), subpar. 3, says very explicitly: "*The Union shall work for (...) a highly competitive social market economy, aiming at full employment and social progress*". The Protocol would have as its objective to clarify the relation between the internal market and fundamental social rights.

In addition, the ETUC called for a revision of the EU legal framework covering the free movement of workers and services, and in particular for an urgent revision of the **Posting Directive**.

### **The social impact of mobility**

- 12) The ETUC has taken note of the Commission's report on the first phase (1 January 2007-31 December 2008) of the Transitional Arrangements, which is giving a positive signal to Member States to open their borders. The report argues that mobile workers from the countries that joined the EU in 2004 and 2007 have had a generally positive impact on Member States' economies; workers from the EU-8 as well as Bulgaria and Romania have made a significant contribution to sustained economic growth. According to the Commission, they have not caused serious disturbances on the Member States labour markets, nor have they significantly displaced local workers or driven down their wages. The report states that both for the EU as a whole and for most individual countries, labour flows have been limited compared to the size of labour markets and to inflows from non-EU countries.
- 13) The ETUC regrets that the report of the Commission puts too much emphasis on the economic impact of enlargement and does not sufficiently address the social impact. It does not recognize the problems and concerns of workers and citizens both in the sending and receiving countries when it comes to the increased mobility of workers and services, and fails to come up with the necessary proposals to address these concerns.

When it comes to the **sending countries**, especially in central and eastern Europe, brain drain and youth drain, as well as negative impacts on family cohesion and children when one or both parents are working abroad, are generally understood as negative side effects of the increased mobility.

In addition, and in relation to the economic crisis, return migration of large numbers of migrants becoming unemployed in the receiving countries are increasingly a serious problem in several countries that are themselves severely hit by the crisis because of closures of companies, many of them foreign owned, with little perspective for those becoming unemployed to find new employment in their own country in the foreseeable future.

In the **receiving countries**, there is considerable evidence of big differences in living conditions of new immigrants as compared to host-country nationals and these include higher risks of poverty, and difficulties in accessing housing, health care and other social services. The Commission's 'Employment in Europe report 2008', in its special chapter 3 on geographical labour mobility, recognizes that *'the failure to create the conditions for mobile workers to integrate in the society can result in serious social problems and a waste of economic benefits of mobility. This failure could be at the root of negative attitudes towards intra-EU mobility'*.

The ETUC is highly critical of the fact that these issues are receiving little attention in the Commission's conclusions and public statements.

### **Internal market, free movement, and fair competition**

- 14) Recent developments have made the debate even more urgent. The financial and economic crisis challenges economies and societies all over Europe, with unemployment figures rising and workers everywhere worried when they will be hit. Governments are considering how to protect their national industries while workers may tend to become more nationalist and xenophobic, afraid about foreign workers 'taking their jobs'. Right wing extremists see their chances and try to exploit these fears to their advantage.

**In this situation, it is of paramount importance to get the EU policies, measures and messages right.**

Everybody agrees that financial markets need measures to create confidence. There is less understanding that the real economy and labour markets need a similar huge effort of **confidence building**.

- 15) In this context, it is important to recall how the founding fathers of the EU looked at the basic principles that should guide the coming about of the internal market.<sup>7</sup> They saw free movement of the two key production factors, capital and labour, as essential for the internal market to prosper. As capital would move to the place of abundant labour, and labour would move to where the jobs are, the end result would be an increasing prosperity for everybody.

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<sup>7</sup> 1956 Ohlin report on the social aspects of European economic cooperation, 1957 Brussels report on general common market ('the Spaak report')

They assumed that there would be no need to interfere actively with possible differences in salary levels, as these would converge because of the concerted actions of trade unions and disappear in the course of time with increasing productivity. But, most importantly, they were convinced that such **different wage levels would not form an incentive for distortion of competition and social dumping, because the free movement of workers would be covered by a host country principle guaranteeing equal treatment and non-discrimination.**

These principles are indeed laid down in Article 39-42 of the EU Treaty.

- 16) However, as we have seen, the recent problems on the EU labour markets have not arisen from the application of the free movement of workers' provisions, but from the fact that these provisions were not applied.

The increased tendency to hire foreign workers via intermediaries (temporary agencies and subcontractors, i.e. so called service providers), a situation not foreseen when the EU was founded, has in recent times challenged the assumptions on which the internal market is built.

In the period of the previous enlargement to the South of Europe, the ECJ had to deal with the question how to interpret the Treaty, and the transitional measures for free movement of workers that some countries had established for Portuguese workers. In a famous case about a Portuguese construction company bringing Portuguese workers into France<sup>8</sup>, the ECJ decided that in such situations the workers concerned were in fact not 'workers' in the sense of Article 39 of the Treaty, and therefore not covered by the transitional measures but were allowed to perform 'services'.

The ECJ created the fiction that those workers 'would not become part of the French labour market'.

This jurisprudence led to a hot debate which ended (provisionally) with the adoption of the **Posting Directive** in 1996.

This Directive was meant to control the damage, by introducing the notion that those workers would be covered in any case by a list of minimum standards applicable in the host country.

It is important to recall the objectives of the Directive, as mentioned in its preamble:

(1)"whereas (...) the abolition, as between Member States, of the obstacles to the free movement of *persons and services* constitutes one of the objectives of the Community";

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<sup>8</sup> Rush-Portuguesa C-113/89

(5)"whereas any such promotion of the transnational provision of services **requires a climate of fair competition and measures guaranteeing respect for the rights of workers**".

- 17) Although from the very beginning the Posting Directive has led to problems with implementation and enforcement, it is only in recent times that the need for a thorough revision of this Directive, and the legal framework of Treaty provisions and jurisprudence of which it is a part, has become very clear.

The ECJ, in the cases Laval, Rüffert and Com vs Luxemburg, has interpreted the Directive in such a way, that it is now to be understood as a **maximum** Directive with regard to the **matters** that can be regulated, the **degree of protection** that can be required, and the **methods** that can be used to ensure that employment conditions must be equally observed by all national and foreign undertakings in the same region or sector. When Member States want to apply higher or different standards by law, or trade unions take action to demand better standards by way of collective agreements, in particular to prevent 'social dumping', ensure equal treatment and promote fair competition between local and foreign service providers, this may be seen as an infringement of Article 49 of the Treaty.

- 18) The ACAS-report, made after the Lindsey-oil case in the UK<sup>9</sup>, shows very clearly what the potential problems are.

When a foreign subcontractor can only be held liable for **minimum** levels of pay and working conditions in the host country, whereas domestic subcontractors will have to (or, in the UK context, are expected to) apply higher (collectively agreed) standards, a clear incentive for 'social dumping' (to be understood as a spiral downward instead of upward) is in place. This goes in several ways against the basic principles of the EU Treaty.

First of all, instead of creating a level playing field for foreign and domestic companies/service providers, it may lead to reverse discrimination (i.e. discrimination of local companies). Secondly, if foreign labour is cheaper on the host country's labour market than domestic labour, then the beneficial effects of the internal market (that labour goes to where job opportunities are without endangering local labour markets, i.e. in situations of tight labour markets only; and that companies go to where abundant labour is...) are severely under threat.

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<sup>9</sup> <http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0>

In this particular case, fortunately it was possible on the basis of trade union intervention, to guide the social unrest in the direction of negotiations and to turn a potentially dangerous situation into a 'deal' that was beneficial for all those involved.

- 19) However, the ETUC is of the opinion that this fundamental problem must urgently be addressed, to **prevent further damage to the development of the internal market and its free movement principles.**

### **ETUC's proposals**

- 20) The EU needs a rigorous commitment from its Member States to fully implement the free movement of workers provisions of the Treaty across the EU, based on equal treatment and non-discrimination of workers and companies in the place where the work is done (the host country principle).

Member States, where appropriate in cooperation with social partners, should more actively and intensively inform their population on the legal framework for free movement of workers and the rights of the workers involved in order to reduce unfounded fears and concerns.

Member States in consultation with social partners should, where necessary, address the weaknesses of their national systems which may lead to an increase in undeclared work, non-application of labour standards and unfair competition on wages and working conditions, and make them '**mobility proof**'. This can help reconsideration of replacing transitional restrictions, where still existing, by appropriate conditions for open borders.

- 21) Two recent examples show clearly how taking or **not** taking such measures makes the difference when it comes to the confidence of workers and citizens in the benefits of open borders and free movement.

In the period before the **Irish referendum** on the Lisbon Treaty, trade unions in Ireland asked for clear guarantees regarding the improvement of the social system, respect for workers' rights and especially collective bargaining rights. After the referendum was lost, analysis showed that the lack of confidence in how Ireland would deal with workers' rights in a globalising world was one main factor for saying no to the Treaty.

Recently, the **Swiss** population had a **referendum** about opening up its borders to workers from the new Member States of the EU and especially Bulgaria and Romania.

After a lot of campaigning and debate led by the trade unions, Switzerland adopted a package of measures to counter possible negative effects in terms of social dumping, and to everybody's surprise the outcome of the referendum was very positive, with almost 60 percent of the voters in favour!. (Liechtenstein went through a similar experience.)

22) The EU also needs to urgently **clarify its legal framework** covering the free movement of **services**.

It is clear that a service company is covered by the freedom of establishment of the Treaty, as well as by the freedom to provide services cross border.

However, in ETUC's view, it is no longer acceptable to govern the increasing market for services within the EU with fictional concepts:

- a. with the notion that all the workers of service providers, when moving cross border are not seen as 'workers' in the sense of the Treaty (whereas formally they are!),
- b. with the fiction that they are 'not becoming part of the labour market of the host country' (whereas many of them do exactly the same work as local workers),
- c. and that their habitual place of work is in their home country (whereas many of them stay for long periods, up to 5 years or longer, and are moved by their service provider from one job to another in the host country or even to other Member States).

These matters are not just issues of bad implementation or enforcement. They demand a **thorough rethink** of the legal framework.

Also the EP, in its Andersson report<sup>10</sup>, has addressed the need to address loopholes and inconsistencies in the current EU legal framework, that are inviting unfair competition between companies and incompatible with the intention of the legislator in the Posting Directive and Services Directive.

23) The ETUC has the following proposals:

Revision of the Posting Directive, to strengthen it and better achieve its aims of guaranteeing fair competition and the respect for workers' rights.

The following points should be addressed:

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<sup>10</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0513+0+DOC+XML+V0//EN>

- a. The **objectives** of the Posting Directive, i.e. respecting the rights of workers and ensuring a climate of fair competition, now only figuring in the preamble of the Directive, must be more clearly laid down in the body of the Directive. In particular, a reference to the social policy objectives of Article 136 of the Treaty, with their clear reference to the aim of 'improving the living and working conditions of workers', would help to ensure a more coherent interpretation of the Directive. Furthermore, it deserves a **broader legal basis**, i.e. Article 137 of the Treaty.
- b. What is essentially **free movement of workers** should be covered by the Treaty provisions written for this purpose, i.e. especially **Article 39** with its strong equal treatment requirement based on the host country principle. This means among other things that the original aim of the **Posting Directive, to only cover clear situations of temporary postings**, when the workers of a service provider cross the border in the framework of a short term service and return with their employer to their country of origin afterwards, must be more clearly translated into the scope of the Directive, for instance by introducing a clear **time limit** for the definition of a posted worker.
- c. This also means that Member States and social partners must be allowed to use effective monitoring and enforcement mechanisms, in particular to check if the posted worker is really 'habitually' employed by the service provider in the country of origin, and that it is intended that he/she returns at the end of the posting.
- d. In the same vein, it is important to more precisely define what is or is not 'transnational provision of services', to **prevent** companies to manipulate applicable law and standards by the **use of letterbox-companies**.
- e. The **minimum character** of the Posting Directive must be **restored**, i.e. the notion that the Directive provides 'minimum-protection' (the core of rights that **must** be applied), which does not prevent legal or collectively agreed standards to provide the workers concerned with more favourable conditions (the standards that **can** be applied), as long as equal treatment and non-discrimination of local and foreign companies is ensured.
- f. When it comes to Member States in their role as legislator, this means that the very restrictive interpretation of the notion of '**public policy provisions**' **must be revised**, to include social objectives and the protection of workers;

- g. Member States in their role of public authorities contracting out public works (public procurement) should be allowed via **social clauses** to demand observance of locally applicable collective wages and working conditions by any company, local or foreign, tendering for the contract;
- h. The Directive should more clearly **respect the different industrial relations models in Member States** as well as the instrument of collective bargaining as a flexible and dynamic process, which – in the interest of both sides of industry as well as of society at large - cannot and should not be treated as just another form of regulation.

The **fundamental right to collective bargaining and collective action** should be understood as allowing trade unions to approach and **put pressure** equally on local and foreign companies to improve living and working conditions of workers and to demand equal treatment of workers performing similar work on the same territory, regardless of their nationality or the place of establishment of their employer.

This should be clarified by introducing in the body of the Directive the **equivalent of the Monti-clause** (for instance: *“this Directive may not be interpreted so as affecting in any way the right of trade unions to take collective action and to negotiate, conclude and enforce collective agreements in order to improve the living and working conditions of workers”*).

- i. In addition, less rigid criteria should be developed to judge if a collective agreement can be upheld vis-à-vis a foreign service provider, for instance in situations in which the **vast majority** of local companies is **in practice bound** by the collective agreement.

An ETUC expert group of trade union experts and academics is currently working on the legal and technical aspects of these proposals, and it is the intention to put a memorandum with proposals and recommendations before the ETUC Executive Committee later this year.

- 24) In addition, ETUC demands a strengthening of the so-called ‘Information Directive’ (about the minimum information that workers should receive from their employer regarding their employment relationship),  
to include all relevant provisions regarding their employment situation in the host country especially in situations of posting.
- 25) Furthermore, ETUC calls on the European Commission to urgently address and solve the possible tensions between the

Rüffert case, the Public Procurement Directive and ILO Convention 94, which aims at preventing that public contracts exert downward pressure on wages and working conditions. The approach taken in ILC 94 is that conditions under public procurement contracts should not be less favourable than those established for the same work in the same area by collective agreement or similar instrument. 10 EU Member States have ratified this convention. The EU Commission and Council of Ministers included it in their call for ratification of all up-to-date conventions in 2006. The EU must therefore ensure that all Member States can continue to adhere to ILC 94, promote its ratification and implementation, and solve any ambiguities in EU legislation that might stand in the way

- 26) In addition, and especially against the background of the current crisis, it is of major importance to clarify the scope for social criteria in public procurement and private contracts to allow local and regional actors to take account of the unemployment in the region when tendering contracts in a clear context of non-discrimination.
- 27) The Commission and the Council must – on the occasion of the evaluation of the second phase of the transitional measures - acknowledge that there are **serious problems** with regard to cross border mobility that demand for urgent action to be taken at national as well as at EU level, as they are threatening social cohesion and the support for the European project.

All stakeholders at EU level – Member States and Social Partners – should work together to create a positive framework to support the coming about of a European labour market, based on the principle of equal treatment and the harmonizing upwards of working conditions and social systems.

They should also agree at the earliest possible moment to attach a **Social Progress Protocol** to the Treaties, confirming social progress as a clear objective of the internal market.

Just saying that the European institutions will '*confirm the high importance attached to (...), including workers' rights*', as is mentioned in the Council conclusions of December 2008 in response to the Irish No, will not do.....

- 28) ETUC will call on employers' organisations at EU level to explore possibilities of jointly addressing the challenges of increased mobility of workers on the emerging European labour market(s).
- 29) Increased cross border mobility also demands the adaptation of trade union actions, activities and structures, in order to provide the workers concerned, especially those temporarily working abroad, with adequate and effective information, support and

protection regarding their social and labour rights. It is now more urgent than ever to invest in cross border solidarity and therefore to implement the resolution, adopted at the ETUC congress in Helsinki 1999 ('Trade Unions without Borders') and the action plan adopted in Seville 2007.

Mutual aid systems between unions cross border on a bilateral as well as multilateral basis must be further developed, building on existing good practice, and the possibility for wider cooperation under ETUC umbrella must be explored.

- 30) Free movement of workers is a fundamental right, a freedom and not an obligation.

Too often, politicians promote high levels of mobility as an aim in itself. But the EU needs to reflect on how much mobility it really needs. Increased and accelerated mobility levels may also have negative side effects, leading for example to erosion of communities and local cohesion. If people are forced to exchange one precarious job for another one, job mobility is not something to be welcomed. When high skilled workers are forced to move out of poverty, to earn more in another country where they are employed far below their skills level, this is a waste of human capital. Some countries, which instead of investing in employment at home relied heavily on their workers being employed elsewhere, are now faced with return-migration of thousands of workers that they cannot offer proper employment.

The mirror of the freedom to move is the freedom not to move. Europe's populations have a right to see their own countries and national stakeholders invest, where necessary with the help of the EU, in a sustainable future at home, which can offer them positive opportunities and incentives for mobility as a free choice.

Mobility in Europe should be optimized, not maximized.

- 31) To safeguard free movement of labour, and get the support of Europe's populations for it, a major confidence building effort must be undertaken. The centrepiece of this effort is, to invest in appropriate forms of protection of workers, to prevent them to turn to protectionism, nationalism and xenophobia.....

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