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Conference Paper

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27th European Regional Conference of the International Telecommunications Society (ITS): "The Evolution of the North-South Telecommunications Divide: The Role for Europe", Cambridge, United Kingdom, 7th-9th September, 2016

Provided in Cooperation with:

International Telecommunications Society (ITS)

Suggested Citation: de Streel, Alexandre; Larouche, Pierre (2016) : A Sustainable EU Regulatory Framework for Digital Services, 27th European Regional Conference of the International Telecommunications Society (ITS): "The Evolution of the North-South Telecommunications Divide: The Role for Europe", Cambridge, United Kingdom, 7th-9th September, 2016, International Telecommunications Society (ITS), Calgary

This Version is available at:

<https://hdl.handle.net/10419/148714>

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A Sustainable EU Regulatory Framework for Digital Services¹

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Digital services – defined broadly as any service provided over electronic communications networks – are currently subject to a patchwork of legislative instruments at EU level. Their fate depends on whether they qualify as ‘electronic communications services’ (and are therefore subject to the electronic communications regulatory framework), ‘Information Society services’ (and therefore subject to Directive 2015/1535 and the e-commerce Directive 2000/31) or ‘audiovisual media services’ (and therefore subject to AVMS Directive 2010/13). The first definition is meant to be exclusive of the last two, but the last two are partially overlapping. When compared to digital networks, it is apparent that no effort at legislative simplification and organisation has yet been made for digital services.

In addition, issues relating to digital services continue to feature on the political agenda. In recent years, the EU and its Member States grappled with network neutrality, leading among others to the enactment of the Open Internet Regulation in 2015. Now, pressure is mounting for legislative intervention concerning ‘online platforms’, however they may be defined.

In order to maintain coherence in the treatment of digital services, to avoid misguided spur-of-the-moment legislative initiatives and to avert fragmentation of the Internet market, we recommend the introduction of a general EU legislative instrument to govern digital services. This should establish fundamental principles and create a point of reference for any policy discussions.

That instrument should be based on the following principles:

- i) Digital services are subject to *home-country control*, so as to create a one-stop environment for digital service providers;
- ii) Digital services are governed by applicable general legislation (competition law, consumer protection law, data protection and privacy law, etc.), and hence *any legislation concerning digital services is subject to a strict requirement of added value over and above existing general legislation*;
- iii) Digital services require *strong and effective enforcement of general and specific laws*, with a commitment from the EU and Member States to dedicate sufficient resources to understand the market functioning and the competitive dynamics of the digital services as well as the application of the rules to traditional and more novel issues.

Each of these principles is reviewed in turn below, after a brief discussion of definitional issues.

1.1. Scope: all digital services

Currently, three different regulatory frameworks deal with digital services:

- The electronic communications regulatory framework deals with *electronic communications services*, defined as a “service normally provided for remuneration which consists wholly or

¹ This paper is based on a report we did for the Centre on Regulation in Europe (CERRE), *An Integrated Regulatory Framework for Digital Networks and Services*, January 2016.

mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services (...) which do not consist wholly or mainly in the conveyance of signals on electronic communications networks”;²

- The Audiovisual Media Services Directive deals with *audiovisual media service*, which is a “service as defined by Articles 56 and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks (...), and an audio-visual commercial communication”;³

This category of services is itself divided into two sub-categories:

- *Television broadcasting (i.e. a linear audiovisual media service)* is ‘an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule’.⁴
 - *On-demand audiovisual media service (i.e. a non-linear audiovisual media service)* is ‘an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider’.⁵
- The E-commerce Directive deals with *Information Society service*, defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.⁶

This distinction between the three types of digital services was introduced in the nineties when the Internet was still in its infancy. Given the current substitutability between digital services, the distinction is less justified and is more difficult to implement.⁷ For instance, the 2007 reform of audiovisual media services directive introduced the notion of ‘non-linear audiovisual media services’, most of which also qualify as ‘Information Society Services’, therefore subjecting them to two different sets of rules. More recently, the discussion around the treatment of OTTs showed that competing services could end up falling in different regulatory boxes, leading to undesirable market distortions.

Therefore, we recommend articulating the regulation of digital services around a global definition, in order to ensure consistency, a level-playing field and technological neutrality.⁸ On that basis, we recommend that a single instrument applies to all ‘digital services’, defined as *any service provided at*

² Art. 2(c) Framework Directive.

³ Art. 1(a) AVMS Directive.

⁴ Art. 1(e) AVMS Directive.

⁵ Art. 1(g) AVMS Directive.

⁶ Art. 1(1b) Directive 2015/1535.

⁷ See BEREC (2015a) for a categorisation of OTTs. Also Godlovitch et al. (2015).

⁸ Also Fabra et al. (2014:34).

*a distance, using electronic communications networks.*⁹ There is no explicit reference to remuneration as digital services are no longer always remunerated with money, but also with valuable data. This definition of ‘digital service’ would include all ‘Information Society services’, all ‘audiovisual media services’ and most ‘electronic communications services’. As regards the latter, the very basic service consisting in the transmission of data over electronic communications networks as such, would remain under electronic communications regulation. Accordingly, it might be advisable to exclude that basic service from the definition of a ‘digital service’ in order to avoid that service being subject to two different sets of rules. Furthermore, services that are non-economic, i.e. provided on a private, small-scale, non-commercial basis, should be excluded from the definition.¹⁰

1.2 Jurisdiction: home-country control

Currently, audio-visual media services and information society services are governed according to home-country control principle.¹¹ Home-country control implies that every provider is subject to the jurisdiction of one, and only one, Member State. Electronic communications services, however, are subject to the country-of-destination principle.

The implementation of home-country control has been central in ensuring the development of digital services in Europe and contributing to the digital single market, as it allows the services to circulate freely between Member States.¹² This principle allows for simplicity and clarity for service providers. It is necessary to avoid protectionist measures or measures that would compromise the delivery of cross-border and pan-European services.

Undermining the strength of the home-country control principle could heavily destabilise or undermine the choices made by providers in terms of establishment.¹³ It would also impact (and add complexity to) the organisation, efficiency and streamlining of their overall European operations. As this would add complexity and fragmentation to a regulatory framework that we wish to see moving towards more coherence and integration, we do not support this option. Any concerns relating to the effect of home-country control should be addressed by a consistent move towards more harmonisation of the regulatory framework and more cooperation between NRAs.

Indeed, we recommend not only that home-country control be maintained for audio-visual media services and Information Society services, but that it be extended to all digital services, including many of the current electronic communications services. We recognise that, in order for an extension and strengthening of home-country control to be politically acceptable, it must be part of a

⁹ See also Art. 3 of the proposal of the Commission of 9 December 2015 for a directive on certain aspects concerning contracts for the supply of digital content refers to “*any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data*”. Note that Rossi (2015:9) proposes a similar definition: digital services are any services provided at a distance and by electronic means.

¹⁰ As is made explicit, for instance, in the AVMS (Recital 21).

¹¹ Resp. Art. 3 AVMS Directive and Art. 3 of the E-commerce Directive.

¹² Results consultation; Also Fabra et al. (2014:38).

¹³ In the recent consultation on the AVMS Directive, some participants advocated measures which, while recognising the merits of the home-country control principle, would nevertheless allow the imposition of some obligations (i.e. promotion of domestic/European works) on a country-of-destination (reception) basis. Others proposed the modification of the jurisdictional criteria.

broader package including harmonisation of substantive rules, trust-building measures between Member States and the possibility of exceptions when important public interests are at stake.

In that context, two important measures could be taken to improve the functioning and the legitimacy of home-country control.

First of all, while EU-based providers are automatically subject to the jurisdiction of the Member State in which they originate, **non-EU providers** typically begin operations in the EU with an existing base outside the EU. Of course, once their presence in the EU reaches a certain level, they usually have to ‘establish’ themselves inside the EU (within the meaning of EU law).¹⁴ Non-EU providers might be able to have an influence over which Member State they are established in; at the same time, the AVMS Directive offers a useful model for rules to simplify the determination of the Member State of establishment¹⁵ and circumscribe the ability of providers to ‘choose’ their home country. Non-EU providers offering digital services in the EU should be compelled to elect an establishment in one of the Member States on the basis of such a set of simple rules and with a *de minimis* exemption, so as to be bound to comply with the harmonised EU rules. This would alleviate important competitive distortions and ensure that fundamental EU values are effectively protected.

Secondly, in addition to forcing non-EU providers to subject to the jurisdiction of an EU Member State, in line the simplified rules for ascertaining the home country recommended in the previous paragraph, **all providers should be obliged to formally declare their Member State of establishment**, as it results from the application of the jurisdictional rules of EU law. In other words, the ‘home-country’ should be specified at the outset, and not left for determination if and when litigation arises. Here as well, in order to avoid that providers try to game the home-country control system, their **declaration should be open to revision**. The AVMS Directive offers a model for dealing with abusive conduct regarding establishment.¹⁶ Furthermore, as is done under competition law when it comes to choosing which NRA will deal with a complaint,¹⁷ a mechanism could be put in place whereby NRAs, in consultation with one another, can override any declaration by a firm and declare which NRA exerts jurisdiction over a given firm.

1.3 The primacy of general legislation

Currently, all (digital and non-digital) services offered in the EU are subject to several general rules regarding freedoms of movement (in particular services and establishment),¹⁸ consumer protection, competition, copyright, personal data protection and security.¹⁹ Many of those rules have recently been strengthened (for instance, personal data protection²⁰ and security²¹) or are expected to be amended and possibly strengthened (for instance, consumer protection²² and copyright²³). In

¹⁴ I.e. they pursue an activity on a stable and continuous basis in one or more Member State(s), within the meaning given to establishment in Case C-55/94, *Gebhard* [1995] ECR I-4165.

¹⁵ These rules centre around the location of the head office and the location where the editorial decisions are made: AVMS, Article 2.

¹⁶ AVMS Directive, Article 4.

¹⁷ Regulation 1/2003, Article 11.

¹⁸ Arts 49-55 TFEU for the freedom of establishment and Arts 56-62 for the freedom to provide services, complemented by Service Directive 2006/123.

¹⁹ Several of those legal instruments are mentioned at the end of this report.

²⁰ See the 2016 General Data Protection Regulation.

²¹ See the 2016 Network Information Security Directive.

²² See Consumer acquis review.

addition, each of the three types of digital services is subject to complementary specific regulations²⁴ which strengthen consumer protection or pursue other public interests, such as media diversity.

In line with the principle of proportionality, it is imperative that specific legislation is subject to a strict test as to whether it adds any value over and above existing general legislation. That strict test cannot be a mere formalistic test on the legal texts; it must also encompass implementation issues. This is why, as discussed further below, the EU and its Member States must commit sufficient resources to the enforcement of general legislation when it comes to digital services. Otherwise a failure at the enforcement level opens the door to the enactment of specific legislation (which in turn might not be sufficiently well enforced), a scenario that can hardly be satisfactory.

Against that background, we find that much of what is currently included in the specific legislation on digital services could be simplified or withdrawn in favour of more general legislation. This includes, for instance, specific consumer protection measures, including those found in Universal Service Directive inasmuch as they relate to services that would now fall under digital services, such as voice telephony. Similarly, to the extent that much of the measures of E-Privacy Directive concern digital services, there is every reason to question their continuing usefulness, against the backdrop of the upcoming General Data Protection Regulation.

Moreover, the primacy of general legislation should apply not only within EU law, but of course to Member State legislative initiatives as well. Accordingly, we recommend a strengthening of Directive 2015/1535. First of all, its scope of application should be extended to all digital services, and not only include Information Society Services. Secondly, a requirement should be added whereby national legislative proposals concerning digital services that do not offer added value as compared to existing general legislation can be vetoed by the Commission.

In sum, we recommend the regulation of digital services to be organised around three layers. These should be defined on the basis of the characteristics of the regulated services; they should also be consistent with each other.

- The first layer concerns the *general rules* applicable to all services, being digital or non-digital. It is made of the *service acquis*. They are not further dealt with here
- The second layer concerns the *specific rules* applicable to all digital services when they raise additional public policy issues, in particular regarding consumer protection.
- The third layer concerns the *specific rules* applicable to the audiovisual media services.

1.3.1 Specific rules on digital services

The specific rules for digital services consist in a streamlining of the current rules of the electronic commerce, the universal service and the audiovisual media directives based on the following two principles: (i) EU specific rules applicable to digital services should not duplicate the EU general rules applicable to all services (which have been recently strengthened), (ii) specific rules should only be adopted when necessary and proportionate, i.e. the digital service should have particular characteristics justifying public intervention.

²³ Communication from the Commission of 9 December 2015, Towards a modern, more European copyright framework, COM(2015) 626.

²⁴ Universal Service Directive and Open Internet Regulation, AVMS Directive and E-commerce Directive. For a Table comparing the obligations of the three directives, see Godlovitch et al. (2015: Annex 2).

On that basis, the following issues are most likely to appear under such specific rules.²⁵ However, in line with our principle of primacy of general legislation, further study is needed (which goes beyond the scope of this report) to ascertain whether existing general rules are not already sufficient to deal with these issues.

- transparency and information on consumer contractual conditions (in particular on price and quality),²⁶ as well as minimum quality requirement for essential digital services,²⁷
- limitation on commercial communications or equivalent (such as sponsorship and product placement),²⁸
- consumer dispute resolution,²⁹
- specific protection rules for minors,³⁰ as well as special measures for disabled users,³¹
- prohibition of incitement to hatred,³²
- portability of digital identity components, such as telephone number,³³
- organisation of the numbering space,³⁴
- limitation of intermediaries' liability,³⁵
- interoperability.

1.3.2 Additional specific rules on audio-visual media services

The distinctive feature that singles out audiovisual media services is the presence of audiovisual content.³⁶ There is a case for leaving in place additional specific rules for such services, in particular as regards the European works and the access to events of major importance for society.

However, we recommend that, within this set of rules, the silos of linear and non-linear services be abandoned. The distinction between linear and non-linear was already problematic in 2007 from the point of view of technological neutrality, as it meant that different regulations are applied to services depending on the technicalities of delivery. Since then, this silo-based approach has become even more problematic. Connected TV's and internet websites or portals allow for the delivery on the same screen of linear (heavily regulated) content, non-linear (lightly regulated) content, and non-regulated content (for example content which falls outside the scope of the AVMS Directive by not meeting the material or the geographical criteria). Furthermore, the increased sophistication of user interfaces makes the consumption of linear or non-linear content (and the shift between them) increasingly seamless.

²⁵ For another interesting proposal, see Rossi (2015).

²⁶ Based on Arts. 20-22 USD, Art. 5 AVMSD, Arts. 5, 6, 10 ECD

²⁷ Arts. 22-23 USD

²⁸ Arts 9-11 and 19-26 AVMSD, Art. 6 ECD.

²⁹ Art. 34 USD, Art. 17 ECD

³⁰ Art. 12 and 27 AVMSD

³¹ Art. 23a USD

³² Art. 6 AVMSD

³³ Art. 30 USD for phone number portability

³⁴ Arts. 26-28 USD.

³⁵ Arts 12-15 ECD.

³⁶ As stated in the recital 5 of the AVMS Directive, "audiovisual media services are as much cultural services as they are economic services" and "their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services".

Regulation that is applied differently to different types of content delivery creates market distortions, especially with the financing of these programs through commercial communications. Above all, differential treatment might mislead consumers about the level (and the effectiveness) of the protection provided on the screen. Continuing to apply different regulatory frameworks for the same content, visible on the same screen and thus targeting the same audience is therefore inappropriate. When services merge on the same device, regulation should also merge.

Moving rules on consumer protection and on protection of minors to the horizontal layer already solves these issues. When it comes to the issue of promotion of, and access to, European works, the tension could be relaxed by introducing more flexibility for the providers in their choice of measures of promotion of European works, replacing quantitative measures by qualitative ones which, even if different in practice between linear and non-linear services, would in principle have the same public interest objective.

1.3.3 No additional, specific rules on online platforms at this stage

Our approach can also be used to assess the need for specific rules concerning online platforms. The Commission has recently launched a major debate to determine whether online platforms should be subject to specific rules, in addition to the existing rules.

In its public consultation, the Commission defines the online platform as *undertakings operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.*³⁷

This definition is controversial, as it is not clear why the Commission emphasises that there must be at least two groups to interact. Using a broader definition, a platform enables at least one group to interact within the same group or with another group.³⁸ The key features are within-group or cross-group external effects, which arise because each participant's benefit from joining and using a platform depends on the decision of other participants. Therefore, for us, online platforms cover a range of different digital services which have one common characteristic: the interaction within or across groups active on the platforms.

More generally, the definition proposed by the Commission suffers from two significant shortcomings from a legislative policy viewpoint: first of all, it brings together a series of phenomena that might not share much more than the definition (Google, Facebook, Expedia, Amazon, Uber, etc. operate according to different business and technical models). Secondly, and most importantly here, it does not single out phenomena that raise distinctive issues as compared to phenomena outside of the definition.

³⁷ Commission public consultation of September 2015 on Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. The Commission notes that some online platforms may qualify as intermediary service providers.

³⁸ Peitz and Valletti (2015) provide a categorisation of digital platforms which includes platforms on which members of a single group interact with each other. As platforms evolve they may change features and move into a different category. For instance, initially Amazon was purely an online retailer, where within-group external effects were present because of Amazon's rating and recommender system for the products it offers. With the increasing importance of Amazon Marketplace, Amazon has become a two-sided platform allowing for the interaction between sellers and consumers.

The Commission asks whether online platforms should be subject to specific rules, in particular regarding “(i) transparency e.g. in search results (involving paid for links and/or advertisement), (ii) platforms' usage of the information they collect, (iii) relations between platforms and suppliers, (iv) constraints on the ability of individuals and businesses to move from one platform to another and (v) how best to tackle illegal content on the Internet”.³⁹

For us, the interaction within or across groups active on the platforms, which is the unique common characteristics of online platforms, does not require specific regulation. Therefore, at this stage, we do not see a need to define online platforms as a new category of digital services and to subject them to specific obligations.

In particular, at this stage of technology and market development, we do not see any particular functionality along the digital value chain that is non-replicable and essential for the whole ecosystem, and which would as such justify access regulation. The tendency of platform markets to become concentrated (and possibly monopolised) is a result of the often positive feedback effects between participants (within a group or across groups). From society's point-of-view such concentration is desirable because it implies that these positive feedback effects materialise; of course, it comes at the risk of higher prices. While a large customer base may appear difficult to overcome, a platform's incumbency advantage can be illusionary. Information about consumer behaviour can quickly become outdated and, even if not so, there are often other powerful platforms with a wealth of similar information on consumer behaviour in related markets which are potential competitors.

It is often said that competition *in* the market is replaced by competition *for* the market; yet something even more fundamental might be at work, namely competition amongst platforms for defining the market on their terms. Even if well-known online platforms hold significant market positions on a narrowly defined market comprising the services they offer, this is not the end of the competitive game. These platforms are also jockeying amongst each other to occupy a central position in the broader digital service environment. Each of them tries to pull the carpet from under the feet of the others, so to say, and turn those others into locally powerful, yet globally marginal players. The presence of a number of platforms at different places in the broader digital service environment, each fighting for a central position, might indicate a lively level of competition that is not necessarily caught using classical competition law analysis.

That does not imply that we are calling for an ‘online Wild West’, as online platforms are subject to general economic regulation (in particular competition law and consumer protection rules), and they would fall under the ‘digital services’ category, meaning that they are subject to the specific rules for digital services,⁴⁰ and if they qualify as an audiovisual media service, to the specific rules for such services.

The implementation of those rules should take into account the specific characteristics and competitive dynamics of those platforms. Some of them, in particular the multi-sided relationship between markets, are better understood by economic theory⁴¹ and tend now to be more and more

³⁹ DSM Communication, p. 12.

⁴⁰ At this point in time, many platforms offer ‘Information Society services’ and are thus covered by the e-commerce directive and its implementation in the laws of the Member States.

⁴¹ E.g. Evans and Schmalensee (2015) and Belleflamme and Peitz (2015, chapter 22).

applied by the competition and regulatory agencies, although not always.⁴² Others, such as the relationship between past and current personal data, are less understood and in need of further research. In particular, competition law and policy, while sufficient in theory to deal with a number of issues relating to online platforms or digital services in general, might need to evolve.

In addition, from a European industrial perspective, the chances of success of EU online platforms would certainly be increased through the application of our proposed framework for digital services, since the main legal obstacles for EU-based firms are legal barriers to entry and fragmentation, both of which hamper firms in quickly scaling up to the EU level. The greater emphasis on general legislation could help in dealing with the first issue, and the greater use of home-country control will alleviate part of the latter issue.

1.4 Commitment to effective enforcement

Finally, the last plank of our proposal is a commitment on the part of the EU and its Member States to dedicate sufficient resources – in terms of both money and personnel – to the enforcement of existing legislation concerning digital services.



There is no doubt that many breaches of competition law, privacy and data protection law or consumer protection law, to name but the main ones, are taking place in the digital service environment. These breaches often go unpunished, for lack of enforcement resources. At this juncture, there are too many Type I (over-enforcement) and Type II (under-enforcement) errors being committed.

This leads to a perception, among users, that user rights are not sufficiently protected in the digital service environment. Firms are also affected: law-abiding firms feel that they cannot compete with firms that flout the law and go unpunished.

As these perceptions grow and gain political momentum, it becomes very difficult to address them by referring to the existence of an adequate legal framework, if that very framework has not been enforced properly. Accordingly, calls for urgent legislative intervention quickly arise, and with them the risk that intervention will be punctual and misguided, as we have already witnessed in the past.

Accordingly, if the primacy of general legislation is to be emphasised more strictly, as recommended by us, the enforcement of such general legislation must be sufficient and adequate. This requires a commitment on behalf of the EU and its Member States to dedicate the necessary resources, on the one hand, to understand digital services in order to be able to reach the right enforcement decisions and, on the other hand, to investigate and punish breaches of the rules.

Main recommendations for the regulation of digital services

-  Simplify and streamline regulation by merging all the specific rules on digital services into a single directive, which would rest on the principles of (i) home-country control, (ii) primacy of general legislation and (iii) commitment to effective enforcement.
-  Maintain and extend the home-country control principle for all digital services, with a strengthened harmonisation of national rules regarding main and common public concerns and a consolidation of the EU networks of national authorities, in particular

⁴² An example is the treatment of online hotel booking platforms in some Member States.

BEREC and ERGA. Ensure that operators established outside the EU and offering digital services in the EU comply with harmonised EU rules.

- ✚ EU rules for digital services should not duplicate the existing general rules applicable to all services (internal market law and the Services Directive, competition law, consumer protection law, privacy and personal data protection law, copyright rules and security rules) and should be limited to what is strictly necessary given the specific characteristics raised by the digitalisation of the services.
- ✚ Additional EU rules for audio-visual services may be foreseen given the cultural and political importance of the media, but only when strictly necessary, and without distinguishing between linear and non-linear services any longer.
- ✚ At this stage of technology and market development, specific rules for online platforms are not justified, but the issue may need to be revisited in the future with a better understanding of the competitive dynamics of those platforms and the effectiveness of the existing rules (in particular competition law and consumer protection law).
- ✚ The EU and Member States should commit to dedicate sufficient resources to the enforcement of existing legislation, and to better understand the functioning of the digital ecosystem and the novel issues it raises.

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