

**MORRISON
FOERSTER**

EU WHISTLEBLOWING DIRECTIVE

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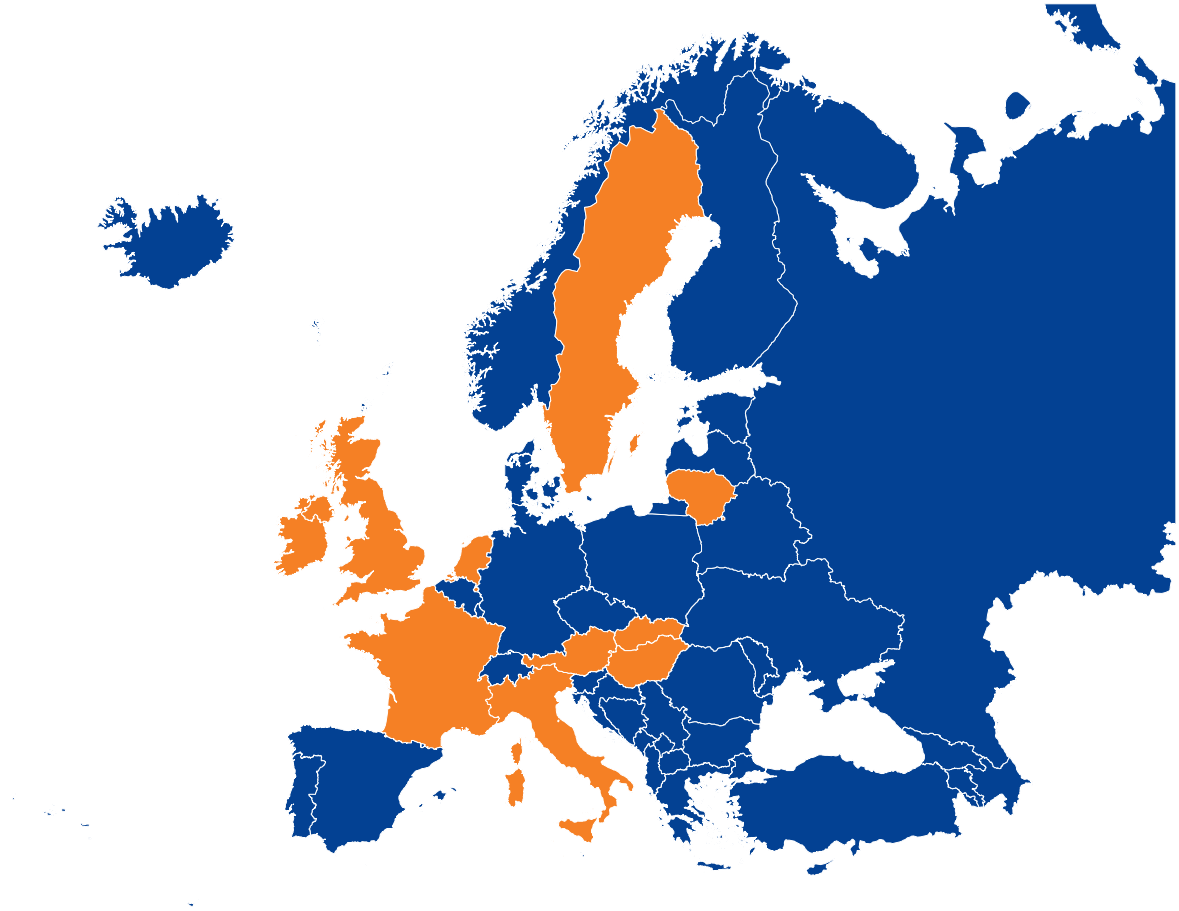
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Whistleblowing Laws in Europe

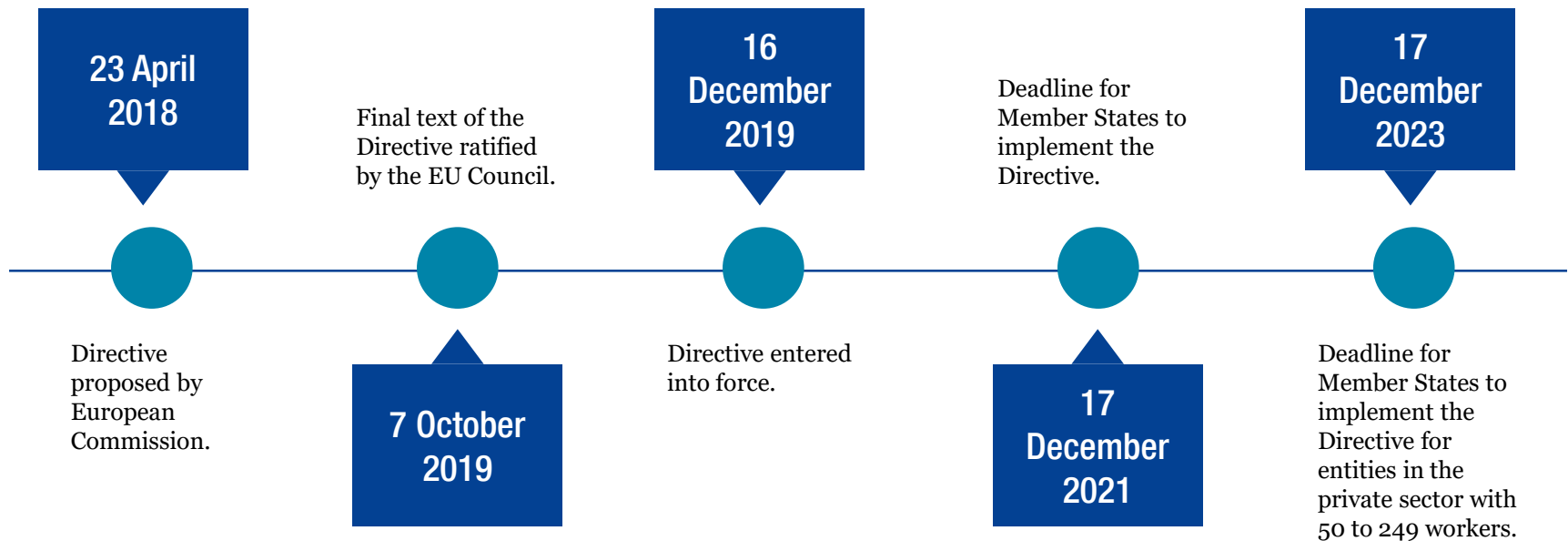
Some Member States already have comprehensive whistleblowing laws (e.g., the UK and the Netherlands).

Other Member States have no omnibus whistleblowing laws (e.g., Germany).



Source: [European Commission Factsheet - April 2018](#)

The Road to the New EU Whistleblowing Directive



[EU Directive 2018/0106](#)

Processing of Personal Data – Article 17

- “**Any processing of personal data** carried out pursuant to this Directive, including the exchange or transmission of personal data by the competent authorities, shall be carried out in accordance with **Regulation (EU) 2016/679** and Directive (EU) 2016/680.”
- “Personal data which are **manifestly not relevant** for the handling of a specific report shall **not be collected** or, if accidentally collected, shall be **deleted without undue delay**.”



Material Scope of the Directive

Establishes **common minimum standards** for the protection of “whistleblowers” reporting certain types of breaches of EU law

Framework
for
internal
reporting
channels

Conditions
for
external
reporting

Confidential
reporting

Support
mechanisms

Protection
against
retaliation

In-Scope Organizations

Currently	Whistleblowing Directive
<p>Varies per EU Member State that have whistleblowing laws, e.g.,:</p> <ul style="list-style-type: none">• UK: All workers are protected – no exemption for small employers. Regime encourages reporting of wrongdoing by protecting whistleblowers against dismissal / detriment. No positive obligation to implement a whistleblowing policy – but it is recommended to do so.• Netherlands: Organizations with at least 50 workers are obligated to implement a policy for handling reports of suspected wrongdoing within their organization.	<p>Organizations with more than 50 workers. (Article 8(3))</p> <p>Worker: A person who, for a certain period of time, performs services for and under the direction of another person for remuneration. (Recital 38)</p> <p>Do workers need to be physically located in the EU? Likely, but unclear – EU Member States need to clarify.</p> <p>Member States may require (Recital 49: “<i>encourage</i>”) organizations in the private sector with fewer than 50 workers to also establish internal reporting channels. (Article 8(7))</p>

Scope of Reportable Concerns

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Includes accounting and auditing matters, bribery, banking and financial crime.</p> <p>Varies per EU Member State, e.g.,:</p> <ul style="list-style-type: none">• UK: Disclosures in the public interest.• Germany: Limited to environmental issues, offenses against human rights or offenses related to organizations (such as fraud, financial misconduct/crime, internal accounting controls or audits, corruption and insider trading).	<p>Violations of EU law, including:</p> <ul style="list-style-type: none">• Public procurement• Financial services• Products and markets• The prevention of money laundering and terrorist financing• Product safety• Protection of the environment• Public health• Consumer protection• Protection of privacy and personal data (Article 2(1)) <p>Member States can extend the scope of reportable concerns. (Article 2(2))</p>

Anonymous Reporting

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Anonymous reporting is permitted, but should not be encouraged. The whistleblower should be encouraged to identify him or herself when making reports.</p> <p>May vary per EU Member State: e.g., note that Spain, for example, now allows anonymous reporting.</p>	<p>The Whistleblowing Directive does not affect the power of Member States to decide whether anonymous reports are allowed - left to the Member States to decide in their national implementation.</p> <p>Note that whistleblowers who report or publicly disclose information on violations of EU law anonymously, and are subsequently identified and suffer retaliation, will qualify for protection. (Article 6(2)(3) & Recital 34)</p>

Prescribed Form/Channels for Reporting?

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: No specific requirements on the form.</p> <p>A specific organization composed of specially trained and dedicated people, limited in number and contractually bound by specific confidentiality obligations. This whistleblowing system should be strictly separated from other departments of the company, such as the human resources department.</p> <p>External service providers must be bound by obligations of confidentiality.</p>	<p>Writing (Article 9(2) & Recital 53):</p> <ul style="list-style-type: none">• Post• Physical complaint boxes• Online platform <p>Oral (Article 9(2) & Recital 53):</p> <ul style="list-style-type: none">• Telephone hotline• Other voice messaging system• In-person / physical meetings (when so requested) <p>Third parties can also receive reports on behalf of the organization (Recital 54):</p> <ul style="list-style-type: none">• External reporting platform providers• External counsel• Auditors• Trade union reps• Employee reps

Record Keeping of the Reports?

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Personal data must be deleted, promptly / within two months of completion of the investigation, unless legal proceedings or disciplinary measures are initiated.</p> <p>Unsubstantiated reports must be deleted immediately.</p>	<p>Obligation on Member States to ensure that: (i) records are kept for every report received, and (ii) records are stored for no longer than necessary and proportionate to comply with the Directive/EU/Member State laws. (Article 18)</p> <p><u>Recorded telephone line/voice messaging system:</u> (i) subject to whistleblower consent, (ii) recording of the conversation in a durable and retrievable form or complete and accurate transcript, and (iii) offer whistleblower opportunity to check, rectify and agree with the transcript.</p> <p><u>Unrecorded telephone line/voice messaging system:</u> (i) right to document the oral reporting in the form of accurate minutes, and (ii) offer whistleblower opportunity to check, rectify and agree by signing the minutes.</p> <p><u>Physical meetings:</u> (i) subject to whistleblower consent, (ii) recording of the conversation in a durable and retrievable form or accurate minutes of the meeting, and (ii) offer whistleblower opportunity to check, rectify and agree with the transcript.</p>

Who is Protected?

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Focus on employees – leaves it up to competent authorities and organizations.</p> <p>May vary per EU Member State, e.g.,:</p> <ul style="list-style-type: none">• UK: All workers (includes contractors, trainees and agency workers).• Netherlands: Employees (persons who perform or have performed work (ii) under a civil law or public-law employment contract or (ii) other than out of employment; includes self-employed persons/freelancers, trainees or volunteers).	<p>All whistleblowers in the private / public sector who acquire information on breaches of EU law in a “<i>work related context</i>”.</p> <p>Includes:</p> <ul style="list-style-type: none">• Current and former employees• Shareholders• Interns• Job applicants• Trainees• Sub-contractors• Facilitators, colleagues or relatives of the whistleblower who are also in a work-related connection with the whistleblower’s employer or customer or recipient of services. <p>(Article 4 and Recital 37-41 & 55)</p>

How Are Whistleblowers Protected?

Protection against retaliation (Article 21)

- ➔ Remedial measures (interim relief, reversing burden of proof) (Article 21(6))
- ➔ Protection from liability (Article 21(7))
- ➔ Protection in judicial proceedings (Article 21(5))
- ➔ Financial assistance and psychological support (Article 20(2))
- ➔ Access to information, advice, assistance & legal aid (Article 20(1))

When Will Protection Apply?

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Whistleblowers may not face any sanctions if they made a report in good faith. If the report is found to be unsubstantiated and the whistleblower to have maliciously made a false declaration, the accused person may want to pursue a case for libel or defamation (whistleblower's identity may then have to be disclosed to the incriminated person if national law allows).</p> <p>UK: Workers who have a reasonable belief that the disclosure is in the public interest.</p>	<p>The whistleblower needs to have reasonable grounds to believe (in light of the circumstances and the information available to them at the time of reporting) that the concern reported is true. (Article 6)</p> <p>The motives of the whistleblowers are irrelevant. (Recital 32)</p> <p>Member States are required to provide for penalties for whistleblowers which knowingly reported or publicly disclosed false information. (Article 23(2) and Recital 102)</p>

How to Handle Whistleblowing Reports?

Information about the reporting process (Article 9(1)(g) & Recital 59)

Confidentiality (Article 9(1)(a))

Impartiality (Article 9(1)(c))

Diligent investigation (Article 9(1)(d))

Asking for clarifications (Recital 57)

Acknowledgment (Article 9(1)(b))

Feedback (Article 9(1)(f))

Information About the Reporting Process

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Not specifically regulated; focus on notice requirements.</p> <p>May vary per EU Member State, e.g.,:</p> <p>Netherlands: Whistleblowing policy must detail, among others, procedures for internal reporting and how such reports will be handled.</p>	<p>Organizations need to provide clear and easily accessible information regarding the internal procedures as well as the procedures for reporting externally to competent authorities and, where relevant, to institutions, bodies, offices or agencies of the EU.</p> <p>Such information must be clear and easily accessible (e.g. posted at a visible location accessible to all and on the website of the entity, and also included in courses and training seminars on ethics and integrity).</p> <p>(Article 9(1)(g) & Recital 59)</p>

Acknowledgement & Asking for Clarifications

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Not specifically regulated; noted that it is harder to investigate a concern if people cannot ask follow-up questions when whistleblowers remain anonymous.</p>	<p>Acknowledgement: Organizations must acknowledge receipt of a report <u>within seven days of the receipt</u>. (Article 9(1)(b))</p> <p>Asking for clarifications: Organizations may ask for further information during the course of the investigation, but <u>without obligating the whistleblower to do so</u>. (Recital 57)</p>

Feedback & Timelines

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Not specifically regulated; focus on notice requirements.</p>	<p>Organizations must provide feedback to the whistleblower (i) <u>within three months from the acknowledgment of receipt</u> or, (ii) if no acknowledgement was sent to the reporting person, <u>three months from the expiry of the seven-day period after the report was made</u>, including:</p> <ul style="list-style-type: none">• The action envisaged or taken following the report; and• The grounds for the choice of that action. <p>If appropriate action still needs to be determined, the whistleblower also needs to be informed accordingly.</p> <p>Feedback is not required as long as it could prejudice the investigation or affect the rights of implicated individuals.</p> <p>Bottom line: whistleblower need to be informed of the investigation's progress and outcome in all cases.</p> <p>(Article 9(1)(f) & Recitals 57-59)</p>

Internal vs External Reporting

Internal reporting within
the organization

1

External reporting to
national / EU authorities

2

Public disclosure if the
breach remains
unaddressed

3

When is External Reporting Allowed?

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: No specific guidance.</p> <p>May vary per EU Member State:</p> <ul style="list-style-type: none">• UK: Allows whistleblowers to make a disclosure to a “<i>prescribed person</i>” if the allegation is true and it falls within the remit of the prescribed person.• Germany: Allowed only in exceptional cases and only when the whistleblower acts with altruistic intentions.	<p>A whistleblower may report to an EU/Member State authority directly if:</p> <ul style="list-style-type: none">• Internal reporting channels are not available• Internal channels do not function properly.• No appropriate action is taken as part of an internal investigation• The reporter has valid reasons to believe that they will suffer from retaliation• The reporter has valid reasons to believe that the authority would be better placed to take effective action <p>(Article 10 & Recital 62)</p>

Disclosure to the Wider Public

Currently	Whistleblowing Directive
<p>WP29 1/2006 Opinion: Not specifically regulated.</p> <p>May vary per EU Member State:</p> <ul style="list-style-type: none">• UK: Prescriptive requirements for disclosures to the wider public in order for the whistleblower to maintain protection.• Germany: Similar position to external reporting.	<p>Despite making a report internally and/or externally, the issue remains unaddressed, for example:</p> <ul style="list-style-type: none">• Reported breach was not appropriately investigated• No appropriate remedial action was taken• There is a risk of retaliation• There is a low prospect of the breach being effectively addressed due to the particular circumstances of the case <p>(Article 15 & Recital 79-81)</p>

Areas for Member State Legislation

Member States may:

Extend the scope of reportable concerns (Article 2(2))

Allow or forbid anonymous reporting (Article 6(2))

Broaden the range of legal entities that must comply (Article 8(7))

Legislate for financial assistance and support, including psychological support (Article 20)

Provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons (Article 23)

Introduce additional protections for reporting persons (Article 25)

What Should Your Organization Do?

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Set up the hotline or update as needed

2

Adjust your hotline to include violations of EU law

3

Open the hotline externally to other individuals (such as former employees, applicants etc.)

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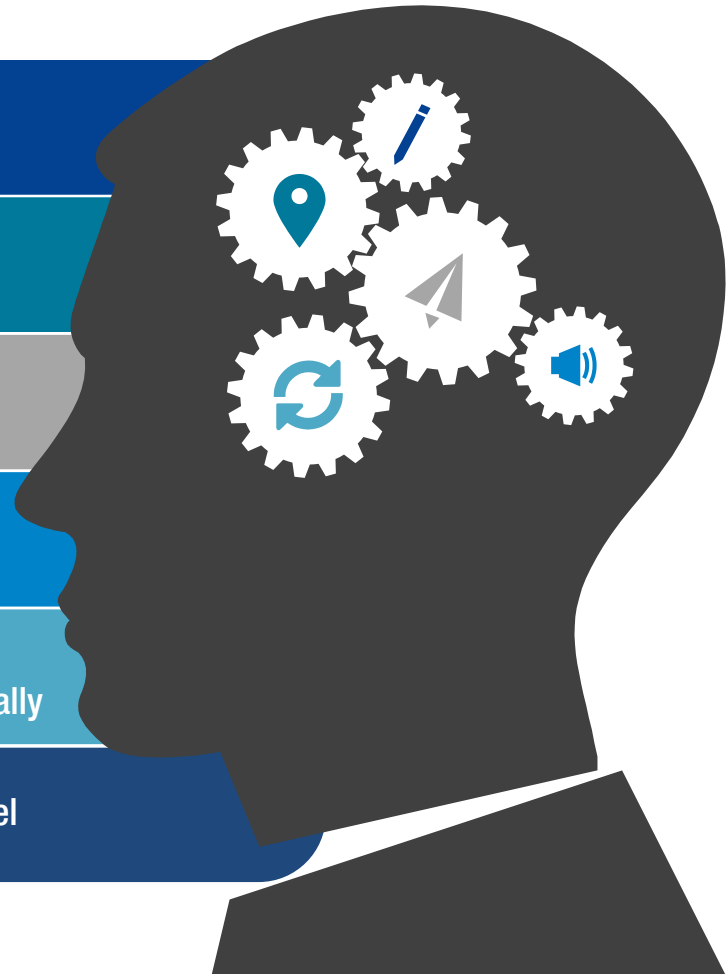
Facilitate physical meetings within a reasonable timeframe

5

Ensure that individuals designated to investigate reports can do so impartially

6

Provide training to personnel



What Should Your Organization Do?

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Provide sufficient information to potential whistleblowers

8

Set up a process to acknowledge receipt and provide feedback

9

Set up processes for whistleblowers to complain about your procedure

10

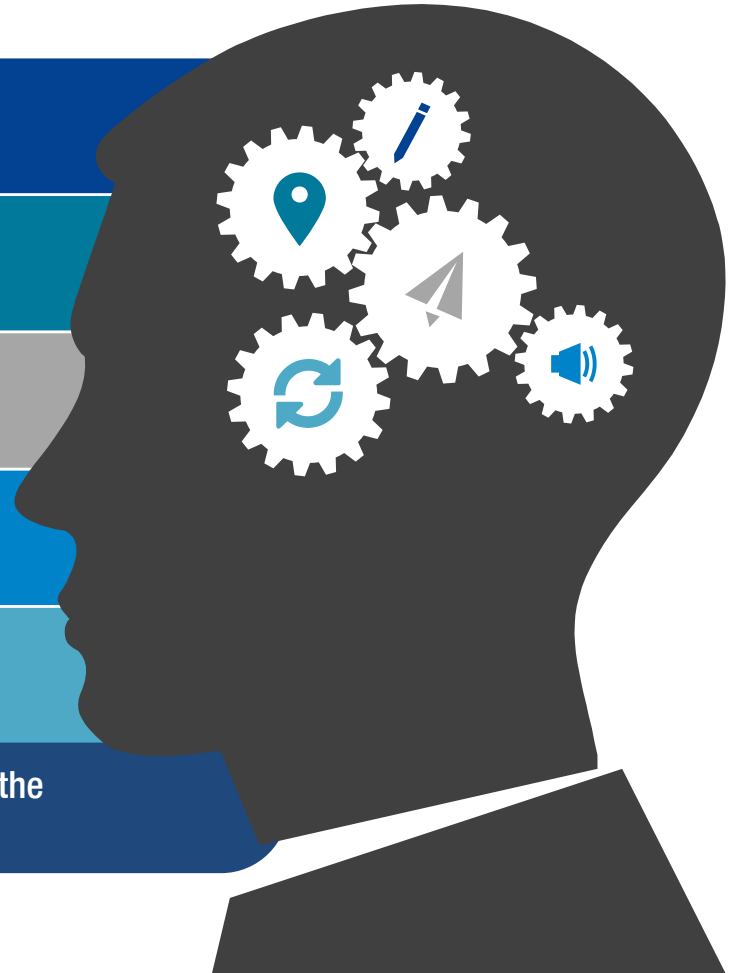
Adjust the process to make individuals comfortable using the hotline

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Review compliance with data protection and labor law

12

Monitor the implementation of the Directive in Member States



Questions?



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