

European Civil
Justice Systems

Third Oxford Consumer ADR Conference

Reforming the EU Consumer ADR Landscape: Implementation and its Issues

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European Civil Justice Systems

The CMS/Swiss Re European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration, and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe. The programme receives research funding from the Swiss Reinsurance Company Limited, the European Justice Forum, and the international law firm CMS.

Executive Summary

This conference brought together policy officials, regulators, ombudsmen, alternative dispute resolution (ADR) bodies, consumers, businesspeople, and academics interested in ADR to examine the major topical issues arising out of the implementation of the European Parliament Directive 2013/11/EU on Consumer ADR (CDR).

- The CDR Directive is a major advance in resolving consumer–trader disputes across Europe. Typically, these concern small matters, but rarely are such disputes effectively addressed by traditional court systems, even small claims systems or collective redress procedures.
- The primary purpose of the Directive is to enhance the health of the EU economy by enabling consumers to raise issues of dissatisfaction and have them resolved swiftly, cheaply, and effectively.
- National CDR systems across Europe show significant differences, alongside many similarities and groupings.¹ National implementation of the CDR Directive is therefore likely to maintain rather than harmonize such differences.
- All Member States that reported here have plans to introduce residual CDR schemes.
- Features likely to be prominent in implementation are: enhanced grouping and signposting of CDR by national portals; the free access of consumers to CDR; the voluntary adoption of CDR for the majority of businesses (at least for the time being) but with increased pressure on sectors to participate in CDR schemes.
- Some Member States are using the opportunity to significantly revise their national CDR and general dispute resolution landscapes, by reviewing the best approach for all types of disputes, and by adopting new and integrated models for both dispute resolution and for delivering consumer advice and regulation of market behaviour.
- Two particular challenges arise in the next few years. First, how to increase the number of businesses that join the CDR system. Second, how to build and ensure professionalism in the ADR community.

Reforming the EU Consumer ADR Landscape:

Implementation and its Issues

Major issues in building the EU system

In welcoming delegates, the Dean of the Faculty of Law at University of Oxford, *Professor Timothy Endicott*, drew an analogy between the organization of the EU and its Member States and the relationship between the forty-eight Colleges and Oxford University. He mused that the traditional techniques of dispute resolution may not be relevant for twenty-first-century problems, and new solutions must be found.

The EU Framework for Consumer ADR established by the Directive was outlined by *Christoph Decker*, Policy Officer at the European Commission's DG SANCO. He recalled the need for mechanisms that provided access to justice for consumer claims, especially unresolved claims, which represented 0.4% of EU GDP. Consumer issues overwhelmingly involve small sums of money, for which ADR systems are highly appropriate. He noted the requirements on Member States to establish a framework of consumer ADR bodies capable of handling any consumer-to-trader claims (apart from exclusions such as health and education), to provide suitable competent authorities to oversee consumer ADR bodies, and to impose obligations on traders to disclose information about the ADR bodies to which they belong. He also noted the criteria that consumer ADR bodies must satisfy.

Models, issues, and lessons on implementation

The opening session, chaired by *Professor Stefan Vogenauer*, Linklaters Professor of Comparative Law at the University of Oxford, focused on the plans of the Member States for implementing the Directive. The main conclusions of this session were:

- The national models and architecture of Member States Consumer ADR (CDR) systems differ, and this will continue after implementation.

- Thus, individual Member States face different challenges in the creation of a residual CDR function, and in ensuring obstacles to full coverage are overcome.
- Member States do not, on the whole, intend to use state money to fund residual CDR schemes. Exceptions are Belgium (€500,000 plus logistics and accommodation, to be evaluated) and Northern European states (such as the Swedish ARN, or where ADR is carried out by public enforcement bodies, as in Lithuania).
- ADR will be free to consumers in many Member States. The clear consensus was that frivolous and vexatious claims, feared by some business sectors, are not found to occur under any existing system.
- It does not necessarily follow from the mere creation of a residual CDR function that business sectors will join the residual CDR, or any other CDR scheme, or agree to use one in the resolution of any individual complaint. Serious work may need to be done in forcing or persuading sectors and businesses to use CDR.
- Certain Member States are thinking strategically about imaginative ideas for reform of their CDR landscape.

Some particular points of note were as follows.

Austria (*Kirstin Grüblinger*, Federal Ministry of Labour, Social Affairs and Consumer Protection) has run a pilot project involving the three stages of electronic filing, conciliation if the trader accepts, and finally an oral procedure chaired by the head of the CDR entity. It has dealt with 250 cases involving a wide range of subjects, and agreement was reached in 50% of them. Some sectors already have CDR (e.g. telecommunications) and the residual scheme will be adapted from the pilot project. The law on ADR will contain a definite list of entities which are to be notified under the Directive. CDR will be free for consumers.

Belgium (*Patricia De Somere*, Council of State) has transposed the Directive.² There are twenty-one notified ADR bodies. An umbrella Consumer Ombudsman Service has been established, which acts as a coordinating structure for the existing CDR services (telecom, postal services, railways, energy, financial services, and insurance) and which acts itself for residual claims. This Service has three functions: to act as an information point (in which, ideally, the Belmed system [The Belgian Digital Portal for Consumer A(O)DR] will be integrated); as a portal which passes disputes to the relevant competent ADR body; and as an ADR body which acts itself when there is no competent qualified entity. There is a federal subsidy of €500,000 for the residual function. All these mediation services will have one single front office and will be housed in one building, and run by a steering committee, while retaining separate legal entities, functions, and competences. Each service will contribute to shared costs in the front office pro rata, and the Federal Public Service for the Economy provides logistics and the building for all. The Consumer Ombudsman Service can represent consumers in the negotiation stage of collective redress proceedings.

In **France** (*Nicole Nespoulous*, Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes [DGCCRF]), the French Parliament has in October 2014 authorized the government to transpose the Directive without further debate. A draft of the future provisions will be elaborated by the Ministry of Economy, Industry and Digital Affairs (DGCCRF) and will be presented to the Conseil d'Etat in February for adoption in late spring 2015. Some of the future legal provisions will be based on the recommendations made by a working group set up one year ago. This working group has reported with thirteen recommendations on mediation.³ Concerning the provisions, it is likely that professionals will be obliged to belong to an ADR of their choice; there will be free access to mediation for consumers; there will be no thresholds; ADR entities will not make binding decisions; and in-house *mediation* will be maintained, subject to strict rules.

Germany (*Ulrike Janzen*, Bundesministerium der Justiz und für Verbraucherschutz) has a strong tradition of court dispute resolution. Alternative Consumer ADR structures are limited to certain

sectors, and there has been criticism of the Directive by academics. There is also a system of private consumer protection associations that are competent to take infringement actions and to give advice, and assist consumers in settling disputes. Swift and consumer-friendly implementation of the ADR Directive is part of the government's programme. Reliance will continue to be placed on privately funded Consumer ADR bodies: these currently exist in transport, insurance, banking, and investment funds. ADR is only mandatory for electricity and air carriers; whether ADR decisions should be binding or not is likely to be left to individual ADR bodies. Decisions on organizing residual public ADR will be matters for Länder governments.

Lithuania (*Algis Baležentis*, Department of Legal Institutions, Ministry of Justice) has an ADR structure based on the compulsory jurisdiction of public enforcement bodies, involving various sectors (financial services, insurance, communications, and energy) and the residual National Consumer Protection Authority (NCPA). There are no private ADR bodies for consumers, although no obstacle to them. CDR is free, involves an adversarial procedure, and is mandatory but generally not binding (with some exceptions, e.g., communications). In 2013, the NCPA had more than 1400 ADR procedures, of which 657 (47%) were upheld, and 33% involved amicable settlement. The compliance rate (38%) gives cause for concern, but has grown slowly: naming-and-shaming and court proceedings are possible remedies. A major reform is envisaged, shifting from public to mixed ADR provision. Nordic Boards of three decision-makers has been an inspiration, with the NCPA providing the secretariat. In order to improve compliance, traders might have a burden to ask for court review.

Portugal (*Teresa Moreira*, Director-General, Consumer Directorate-General) has a long history of ADR, with ten ADR centres focused on the major areas of population since 1988. Among these, a national residual scheme was recently created, and three sectoral schemes exist (insurance, automobiles, and e-commerce). ADR is mandatory for key utilities services such as energy, telecoms, water and waste, and postal services. A 2011 plan for a national network was not implemented after a change of government. The Framework Law 67/2013 for

regulation entities includes an obligation to create and/or support ADR bodies. ADR with general competence has always provided services free of charge, but the introduction of moderate filing fees is under consideration. Funding is mostly public (shared between the Ministry of Justice, the Consumer Directorate-General, and local Municipalities), although participating business associations also contribute small sums. A national population of 10 million currently raises 15,000 inquiries and 8000 complaints per year: 70–75% are resolved; 80% by mediation and 20% by conciliation/arbitration. Discussions are ongoing to encourage specialized ADR, namely to create ADR for banking services. Regional proximity to consumers and businesses is considered important: local business involvement is high. Provision of public funding permits greater direction on the policy of architecture and operations. ADR is seen as an opportunity to identify and share best business practices.

The United Kingdom (*Nick Mawhinney*, Department for Business, Innovation & Skills) is envisaging a residual scheme to sit alongside the wide range of existing sectoral ADR schemes. Claims statistics have been used to identify those sectors that can be expected to give rise to claims under a residual scheme: retail, secondhand car, and building sectors are particularly affected. The intention is that CDR will remain voluntary for those sectors for which it is not mandatory by law. This will allow expansion of CDR by sequential targeting of high-complaint sectors. A national helpdesk will help consumers to navigate the system. In response to the UK's consultation, those supporting overhaul of the landscape favoured an umbrella system with a single entry point. Debate on whether to make ADR compulsory involves balancing the benefits of the simplification offered by a single point of entry with the possible cost to businesses. Initiatives to raise awareness will be timed so as to gain maximum benefit from the new arrangements. Guidance will be published in spring 2015 within the framework of extensive guidance on the forthcoming Consumer Rights Act. Implementing legislation will be in two phases: the first will designate competent authorities, so as to enable them to begin to carry out their functions, and the main Regulations will follow.

Developments in CDR: Aviation, ECCs, and regulators

The session chaired by *Professor Cosmo Graham* of Leicester University began by focusing on developments in the aviation sector. He explained that most claims relate to delayed flights, for which compensation sums are prescribed under Regulation (EC) No 261/2004. A series of cases have been raised in national courts and the European Court of Justice on its interpretation. In the UK, consumer claims may be made to the regulator — the Civil Aviation Authority (CAA) — which handled 26,000 in 2013. Professor Graham noted the study that he has recently undertaken for the CAA on internal business complaint handling schemes.

In Germany, legislation in 2013 required all airlines operating from/to a German airport to join a CDR. *Dr Christof Berlin* of the Schlichtungsstelle für den öffentlichen Personenverkehr (söp), reported that most of the bigger airlines have joined söp. In the meantime, the experience with söp made them change their attitudes markedly: prior views about bias and lack of expertise have been replaced by plaudits about independence, efficiency, expertise, and balance.

The UK CAA has undertaken a facilitated discussion with the airlines over the possibility of ending its current second-tier complaint handling service, funded through general regulatory charges, and the establishment by airlines of a private, directly funded CDR scheme to replace it. *James Tallack* of the CAA reported that decisions will be taken shortly, but support for the principle of private CDR appears strong. The debate was influenced by qualitative research commissioned by the CAA that showed that consumers saw significant value in an independent scheme, but only if it provides a clear, concrete, and enforceable resolution and preserves the consumer's right to go to court. Importantly, the research found that consumers are not of the view that they should have to pay anything to complain — a clear rejection of even a nominal fee being charged. A major driver of airline interest in CDR is that, spurred on by the availability of high levels of fixed-sum compensation under EU passenger rights legislation, no-win no-fee claims management companies (CMCs) have emerged in the sector that generate multiple, sometimes poorly justified claims, and withdraw costs from consumers. CDR appears to be seen by

the airlines as a way to design CMCs out of the redress landscape in aviation.

Jolanda Girzl of the Konsument Europa/ECC Sweden and Konsumentverket/Swedish Consumer Agency noted that, in the vast majority of European Consumer Centre (ECC) cases where ADR could be relevant, the possibility of ADR does not exist. Where it does exist, the competences of many ADR-systems are severely limited, owing to, for instance, only having regional competences, dealing only with cases concerning members of a certain organization, or only dealing with cases if the trader agrees. As a result, ADR is often not a possible approach in practice. The ADR system in Sweden involves a residual ADR entity, the National Board for Consumer Disputes (ARN), a public authority, plus some sectoral ADR Boards. ARN registered 11,301 cases during 2013, of which, 76% of their recommendations are followed and a further 5% followed after threat of publication in the consumer magazine *Råd & Rön*. This 'blacklist' is given wide publicity and provides a strong incentive for business compliance. ECC Sweden reported on problems regarding disputes on air passenger rights, and *Jolanda Girzl* raised serious concerns that some airlines do not follow ARN recommendations.⁴ She called for an evaluation of certain types of ADR to assess whether they are better suited for cross-border claims, and to look further into the obstacles to ADR handling. Increased focus should be placed on transnational learning and a 'good practice/lessons learnt' guide of ADR system-building could be created.

The importance of the relationship between complaints and enforcement was highlighted by *Henrik Øe*, the Consumer Ombudsman of Denmark. He reminded delegates that, in Denmark, the word Ombudsman is restricted to two people: the Ombudsman for complaints against state entities and the Ombudsman for consumers, and that the latter is the national enforcer of consumer law, while the ADR function rests with separate boards. His enforcement function is bolstered by significant enforcement powers, frequently resulting in undertakings, settlements, and advance indications. He obtains information from various sources, including ADR (especially on unfair terms), and he decides to initiate action in 1000 of the 6000

contacts he receives annually. He noted the need for test cases to resolve some situations. He showed that regulatory redress powers can be more effective than ADR in some situations: he has used his mass redress powers in a succession of cases, without so far needing to resort to court battles. Mr Øe called for common rules on publication of non-adherence, since Danish companies can be 'named and shamed' but not foreign ones, and raised the question of how this is to be remedied.

Building trust and legitimacy in ADR entities

Dr Naomi Creutzfeldt, ESRC Research Fellow at the Centre for Socio-Legal Studies, Oxford, reported on her ongoing research project on 'trusting the middle man'. A wide-ranging questionnaire is being sent to consumers who have used leading CDR entities in various countries. She encouraged more questionnaires to be sent. Initial results of three of the current fourteen CDRs indicate that many complainants expected the process to take three months, and complaints were generally handled within three months, although within one month by söp. Complainants are generally mature, educated, white people.

Delegates were reminded that CDRs need to satisfy the following criteria:

1. Expertise
2. Training
3. Independence, lack of bias
4. Governance
5. Transparency
6. Regulation of CDR bodies
7. Cost
8. Verification/audit/peer review

Caroline Mitchell of the UK Financial Ombudsman Service (FOS) identified the lack of public trust in the banking sector and the higher level of trust shown in the FOS, but noted that trust can easily be lost. The FOS has grown to 4000 staff, including 300 ombudsmen. She outlined the challenge of establishing suitable and expert training, in order to foster three key competencies: technical; decision-making skills (including judgement and communication skills); and the highly important attribute of a sense of fairness. The latter involves listening, understanding what people are actually

saying, an open and inquiring mind, a flexible approach, and qualities of bravery and resilience. The first two competencies can be taught, but the third is more inherent in the individual, and is therefore assessed at interview. FOS employees undertake at least five full training days each year, which is frequently interactive and never didactic.

Stéphane Mialot, Directeur General, Le médiateur national de l’Energie, France, observed that ADR used to have a bad reputation in France, and that transparency for ombudsmen is vital. Publishing the names of ombudsmen and their team is important to prevent decisions being delegated to trainees or staff without a legal background. Publication of at least major decisions (he published 5% a year) is essential to forestall criticism of their quality, and publication of statistics demonstrates effectiveness and efficiency, and provides useful data on the state of a market. Repeated bad practices need to be identified and the names of the companies involved should be disclosed if necessary. His service launched an ODR platform in 2013, which has introduced a major improvement in transparency, in which parties can see all information relating to their own cases. Unjustified concerns over maintaining confidentiality prevents improvement.

Eric Houtman, Energy Ombudsman of Belgium, reported on the set of criteria for ADR entities in Belgium, which extends the list in the Directive:

1. Independence and impartiality
2. Expertise
3. Transparency
4. Accessibility
5. Free or inexpensive procedure
6. Accuracy
7. Reasons to refuse to handle a complaint
8. Notification delays
9. Dispute handling delays
10. Reasonable thresholds
11. Fairness
12. Confidentiality
13. Information

Dr Ying Yu of the China University of Political Science and Law, Beijing, and Wolfson College, Oxford noted that the Chinese Consumer Association received 13,000 cases in 2013, whereas the online trader Alibaba processed fifty times that. She noted that although the recent IPO of Alibaba (which raised \$21.8 billion) was underpinned by its ODR system, the ADR scheme that is used for 80% of purchases, Alipay, had not been floated (valued at \$231 billion). Alipay operates a highly effective escrow system, in which payments are held by the financial intermediary until the consumer confirms satisfactory performance of the contract. Mediation by ADR bodies has been included in the 2014 revision of the Chinese Consumer Protection Law 1994/2014, Article 39.

In general discussion, it was noted that the FOS aims to ensure consistent application of the law by internal procedures that support standard approaches to similar situations. It is law that the FOS, and some other ombudsmen, take the law into account, but decide cases on the basis of what seems fair and reasonable to them.

A need was noted to ensure that CDR entities deliver consistent quality under a recognized brand, without competition between levels of quality. The adoption of CDR by business should be led by government policy, but be supported by those businesses and trade associations that already recognize its value. Historically, CDR has spread either by top-down imposition by law, or bottom-up adherence by trade sectors; that is, the instigators have typically been governments or trade associations.

Mainstream, no longer alternative: The immediate issues and the ultimate vision for the UK

How consumer ADR fits in a bigger picture

Professor Christopher Hodges, Professor of Justice Systems, and Head of the CMS/Swiss Re Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies, University of Oxford, noted the clear fall in claims statistics for courts — especially the small claims track, which is relevant for consumer claims, and currently stands at around 60,000 claims,

of which 30,000 are heard — and the inexorable rise in claims handled by CDR entities (currently at least 550,000). This shift in justice tracks is accompanied by development in other types of claims: modernization of public sector complaints;⁵ mandatory notification of ACAS before starting Employment Tribunal cases; not only extending mediation in family cases,⁶ but a suggestion by the President of the Family Division that judges should no longer decide divorce cases. Thus, he suggested that it is time to look holistically at modernizing the entire justice system by reviewing what procedures and architectures respond best for every major type of dispute.

Professor Hodges also called for a migration from arbitration-based CDR to ombudsman-based systems. The reason is that the latter can deliver greater value by covering a wider range of functions. Arbitration schemes can deliver satisfactory dispute resolution, but ombudsmen systems are better at delivering widespread advice (initial contacts are frequently for general advice and assistance, rather than as a fully formed complaint) and able to provide aggregated data on market activities (trends, rogue traders, areas where compliance or improved service could be addressed). He noted the close relationship between complaint information and regulatory enforcement in Denmark and the UK, leading to highly effective and swift responses to market conditions, maintenance of competition, and payment of redress.

The future of dispute resolution

Caroline Wayman, Chief Executive and Chief Ombudsman of the Financial Ombudsman Service, UK, gave an overview of the organization and its current focus. Surveys report 80% awareness of the FOS by consumers. However, consumers still show significant reluctance to raise complaints. 'I didn't know if this was OK or not' and 'I feel listened to' are frequent responses heard by the FOS once a complaint is brought. The approach of the FOS is to evaluate not only the complaint itself, but to identify underlying concerns and the salient issue that has to be decided. She asserted that decisions have to *feel* fair: it is not enough that they be fair. The FOS provides thorough feedback on findings, which help to guide policymaking, such as when a recent report on payday lending brought to light the fact that one

in six complaints related to fraud, enabling the issue to be addressed by enforcement authorities.⁷ The FOS also intervened in cases concerning web-based payday loan operators, which many consumers are unaware are actually brokers. FOS officials aim to contact these brokers and resolve repayment quickly, but also follow-up subsequently to check that repayment has in fact been made. The FOS is also conducting public engagement activities to improve awareness of complaints procedures among certain regions or demographic groups which have been identified as being particularly susceptible to problems associated with bad practice by businesses.

Delivering professionalism in ombudsmen

Lewis Shand Smith, Chief Executive and Chief Ombudsman of Ombudsman Services and Chairman of the Ombudsman Association (speaking in the latter capacity) identified a need for professionalism across the ombudsman community. He highlighted the scope of such a project by showing that, at the end of last year, 4300 staff handled 2.5 million contacts and 500,000 investigations annually — statistics that relate to just four of the Ombudsman Association's seventy member groups. He warned of the risk that a proliferation of ADR entities in a sector might jeopardise the establishment of consistency of approach, and lead to adverse competition between the various bodies. While acknowledging that it is no longer clear what the 'ombudsman model' is any more, he identified the need for a recognizable brand to be established in the eyes of consumers, through the widespread use of common language and processes,⁸ ease of access to services, and the maintenance of high levels of public trust. In order to ensure that quality of service is upheld, he called for a professional body to set and apply standards, with training and transferrable skills.

A panel discussion followed, chaired by *Brian Hutchinson* of University College, Dublin, with *Robert Behrens*, Independent Adjudicator for Higher Education; *Adam Sampson*, Legal Ombudsman; *Kevin Grix*, Furniture Ombudsman; *Christopher Hamer*, Property Ombudsman; *Gina Shim*, CEDR; *Richard Dilks*, Which?; and *Dr Sonia Macleod*, Centre for Socio-Legal Studies, Oxford. A consensus was reached which supported the importance of a single point of access, oversight, and regulation for CDR, rather than

particular structures. In the same way that ADR is challenging courts and lawyers, CDR and ombudsman structures have no absolute right to exist, and the public interest comes before

imperialism. A future lead competent authority might take the lead in establishing professional standards and education, but a separate professional association should otherwise drive these issues.

Notes

¹ C. Hodges, I. Benöhr and N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Oxford: Hart Publishing, 2012).

² Belgian Code of Economic Law, Book XVI, in force from 1 January 2015. Book XVII covers collective redress.

³ See <http://www.economie.gouv.fr/dgccrf/Recourir-a-la-mediation-ou-a-la-conciliation>.

⁴ *Alternative Dispute Resolution in the Air Passenger Rights sector* (ECC, 2012), at http://ec.europa.eu/consumers/ecc/docs/adr_report_06022013_en.pdf

⁵ *More complaints please!* House of Commons Public Administration Select Committee (PASC), Twelfth Report of Session 2013–14, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 26 March 2014, at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf>; *Time for a People's Ombudsman Service*, House of Commons Public Administration Select Committee (PASC), Twelfth Report of Session 2013–14, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 1 April 2014, at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/655/655.pdf>

⁶ Sir James Munby, '21st Century Family Law', the 2014 Michael Farmer Memorial Lecture by the President of the Family Division at the 2014 Legal Wales Conference at Bangor University, 10 October 2014, at <http://www.judiciary.gov.uk/announcements/21st-century-family-law-speech-by-sir-james-munby>

⁷ *Payday lending: pieces of the picture. Financial Ombudsman Service insight report*, August 2014, at http://www.financial-ombudsman.org.uk/publications/policy-statements/payday_lending_report.pdf

⁸ Note considerable current variations: Margaret Doyle, Varda Bondy, Carolyn Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study* (October 2014), at www.ombudsresearch.org.uk



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