

Directive 2009/138/EC of the European Parliament and of the Council
of 25 November 2009 on the taking-up and pursuit of the business of
Insurance and Reinsurance (Solvency II) (recast) (Text with EEA relevance)

TITLE I

**GENERAL RULES ON THE TAKING-UP AND PURSUIT OF
DIRECT INSURANCE AND REINSURANCE ACTIVITIES**

CHAPTER I

Subject matter, scope and definitions

Section 1

Subject matter and scope

Article 1

Subject matter

This Directive lays down rules concerning the following:

- (1) the taking-up and pursuit, within the Community, of the self-employed activities of direct insurance and reinsurance;
- (2) the supervision of insurance and reinsurance groups;
- (3) the reorganisation and winding-up of direct insurance undertakings.

Article 2

Scope

1 This Directive shall apply to direct life and non-life insurance undertakings which are established in the territory of a Member State or which wish to become established there.

It shall also apply to reinsurance undertakings which conduct only reinsurance activities and which are established in the territory of a Member State or which wish to become established there with the exception of Title IV.

2 In regard to non-life insurance, this Directive shall apply to activities of the classes set out in Part A of Annex I. For the purposes of the first subparagraph of paragraph 1, non-life insurance shall include the activity which consists of assistance provided for persons who get into difficulties while travelling, while away from their home or their habitual residence. It shall comprise an undertaking, against prior payment of a premium, to make aid immediately available to the beneficiary under an assistance contract where that person is in difficulties following the occurrence of a chance event, in the cases and under the conditions set out in the contract.

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The aid may comprise the provision of benefits in cash or in kind. The provision of benefits in kind may also be effected by means of the staff and equipment of the person providing them.

The assistance activity shall not cover servicing, maintenance, after-sales service or the mere indication or provision of aid as an intermediary.

- 3 In regard to life insurance, this Directive shall apply:
- a to the following life insurance activities where they are on a contractual basis:
 - (i) life insurance which comprises assurance on survival to a stipulated age only, assurance on death only, assurance on survival to a stipulated age or on earlier death, life assurance with return of premiums, marriage assurance, birth assurance;
 - (ii) annuities;
 - (iii) supplementary insurance underwritten in addition to life insurance, in particular, insurance against personal injury including incapacity for employment, insurance against death resulting from an accident and insurance against disability resulting from an accident or sickness;
 - (iv) types of permanent health insurance not subject to cancellation currently existing in Ireland and the United Kingdom;
 - b to the following operations, where they are on a contractual basis, in so far as they are subject to supervision by the authorities responsible for the supervision of private insurance:
 - (i) operations whereby associations of subscribers are set up with a view to capitalising their contributions jointly and subsequently distributing the assets thus accumulated among the survivors or among the beneficiaries of the deceased (tontines);
 - (ii) capital redemption operations based on actuarial calculation whereby, in return for single or periodic payments agreed in advance, commitments of specified duration and amount are undertaken;
 - (iii) management of group pension funds, comprising the management of investments, and in particular the assets representing the reserves of bodies that effect payments on death or survival or in the event of discontinuance or curtailment of activity;
 - (iv) the operations referred to in point (iii) where they are accompanied by insurance covering either conservation of capital or payment of a minimum interest;
 - (v) the operations carried out by life insurance undertakings such as those referred to in Chapter 1, Title 4 of Book IV of the French 'Code des assurances';
 - c to operations relating to the length of human life which are prescribed by or provided for in social insurance legislation, in so far as they are effected or managed by life insurance undertakings at their own risk in accordance with the laws of a Member State.

Section 2

Exclusions from scope

Subsection 1

General

Article 3

Statutory systems

Without prejudice to Article 2(3)(c), this Directive shall not apply to insurance forming part of a statutory system of social security.

Article 4

Exclusion from scope due to size

1 Without prejudice to Article 3 and Articles 5 to 10, this Directive shall not apply to an insurance undertaking which fulfils all the following conditions:

- a the undertaking's annual gross written premium income does not exceed EUR 5 million;
- b the total of the undertaking's technical provisions, gross of the amounts recoverable from reinsurance contracts and special purpose vehicles, as referred to in Article 76, does not exceed EUR 25 million;
- c where the undertaking belongs to a group, the total of the technical provisions of the group defined as gross of the amounts recoverable from reinsurance contracts and special purpose vehicles does not exceed EUR 25 million;
- d the business of the undertaking does not include insurance or reinsurance activities covering liability, credit and suretyship insurance risks, unless they constitute ancillary risks within the meaning of Article 16(1);
- e the business of the undertaking does not include reinsurance operations exceeding EUR 0,5 million of its gross written premium income or EUR 2,5 million of its technical provisions gross of the amounts recoverable from reinsurance contracts and special purpose vehicles, or more than 10 % of its gross written premium income or more than 10 % of its technical provisions gross of the amounts recoverable from reinsurance contracts and special purpose vehicles.

2 If any of the amounts set out in paragraph 1 is exceeded for three consecutive years this Directive shall apply as from the fourth year.

3 By way of derogation from paragraph 1, this Directive shall apply to all undertakings seeking authorisation to pursue insurance and reinsurance activities of which the annual gross written premium income or technical provisions gross of the amounts recoverable from reinsurance contracts and special purpose vehicles are expected to exceed any of the amounts set out in paragraph 1 within the following five years.

4 This Directive shall cease to apply to those insurance undertakings for which the supervisory authority has verified that all of the following conditions are met:

- a none of the thresholds set out in paragraph 1 has been exceeded for the three previous consecutive years; and

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- b none of the thresholds set out in paragraph 1 is expected to be exceeded during the following five years.

For as long as the insurance undertaking concerned pursues activities in accordance with Articles 145 to 149, paragraph 1 of this Article shall not apply.

5 Paragraphs 1 and 4 shall not prevent any undertaking from applying for authorisation or continuing to be authorised under this Directive.

Subsection 2

Non-life

Article 5

Operations

In regard to non-life insurance, this Directive shall not apply to the following operations:

- (1) capital redemption operations, as defined by the law in each Member State;
- (2) operations of provident and mutual benefit institutions whose benefits vary according to the resources available and in which the contributions of the members are determined on a flat-rate basis;
- (3) operations carried out by organisations not having a legal personality with the purpose of providing mutual cover for their members without there being any payment of premiums or constitution of technical reserves; or
- (4) export credit insurance operations for the account of or guaranteed by the State, or where the State is the insurer.

Article 6

Assistance

1 This Directive shall not apply to an assistance activity which fulfils all the following conditions:

- a the assistance is provided in the event of an accident or breakdown involving a road vehicle when the accident or breakdown occurs in the territory of the Member State of the undertaking providing cover;
- b the liability for the assistance is limited to the following operations:
 - (i) an on-the-spot breakdown service for which the undertaking providing cover uses, in most circumstances, its own staff and equipment;
 - (ii) the conveyance of the vehicle to the nearest or the most appropriate location at which repairs may be carried out and the possible accompaniment, normally by the same means of assistance, of the driver and passengers to the nearest location from where they may continue their journey by other means; and
 - (iii) where provided for by the home Member State of the undertaking providing cover, the conveyance of the vehicle, possibly accompanied by the driver and

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passengers, to their home, point of departure or original destination within the same State; and

c the assistance is not carried out by an undertaking subject to this Directive.

2 In the cases referred to in points (i) and (ii) of paragraph 1(b), the condition that the accident or breakdown must have happened in the territory of the Member State of the undertaking providing cover shall not apply where the beneficiary is a member of the body providing cover and the breakdown service or conveyance of the vehicle is provided simply on presentation of a membership card, without any additional premium being paid, by a similar body in the country concerned on the basis of a reciprocal agreement, or, in the case of Ireland and the United Kingdom, where the assistance operations are provided by a single body operating in both States.

3 This Directive shall not apply in the case of operations referred to in point (iii) of paragraph 1(b), where the accident or the breakdown has occurred in the territory of Ireland or, in the case of the United Kingdom, in the territory of Northern Ireland and the vehicle, possibly accompanied by the driver and passengers, is conveyed to their home, point of departure or original destination within either territory.

4 This Directive shall not apply to assistance operations carried out by the Automobile Club of the Grand Duchy of Luxembourg where the accident or the breakdown of a road vehicle has occurred outside the territory of the Grand Duchy of Luxembourg and the assistance consists in conveying the vehicle which has been involved in that accident or breakdown, possibly accompanied by the driver and passengers, to their home.

Article 7

Mutual undertakings

This Directive shall not apply to mutual undertakings which pursue non-life insurance activities and which have concluded with other mutual undertakings an agreement which provides for the full reinsurance of the insurance policies issued by them or under which the accepting undertaking is to meet the liabilities arising under such policies in the place of the ceding undertaking. In such a case the accepting undertaking shall be subject to the rules of this Directive.

Article 8

Institutions

This Directive shall not apply to the following institutions which pursue non-life insurance activities unless their statutes or the applicable law are amended as regards capacity:

- (1) in Denmark, Falck Danmark;
- (2) in Germany, the following semi-public institutions:
 - (a) Postbeamtenkrankenkasse,
 - (b) Krankenversorgung der Bundesbahnbeamten;
- (3) in Ireland, the Voluntary Health Insurance Board;
- (4) in Spain, the Consorcio de Compensación de Seguros.

Subsection 3

Life

Article 9

Operations and activities

In regard to life insurance, this Directive shall not apply to the following operations and activities:

- (1) operations of provident and mutual-benefit institutions whose benefits vary according to the resources available and which require each of their members to contribute at the appropriate flat rate;
- (2) operations carried out by organisations, other than undertakings referred to in Article 2, whose object is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, whether or not the commitments arising from such operations are fully covered at all times by mathematical provisions;
- (3) the pension activities of pension insurance undertakings prescribed in the Employees Pension Act (TyEL) and other related Finnish legislation provided that:
 - (a) pension insurance companies which already under Finnish law are obliged to have separate accounting and management systems for their pension activities, as from 1 January 1995, set up separate legal entities for pursuing those activities; and
 - (b) the Finnish authorities allow, in a non-discriminatory manner, all nationals and companies of Member States to perform according to Finnish legislation the activities specified in Article 2 related to *that* exemption whether by means of ownership or participation in an existing insurance company or group or by means of creation or participation of new insurance companies or groups, including pension insurance companies.

Article 10

Organisations, undertakings and institutions

In regard to life insurance, this Directive shall not apply to the following organisations, undertakings and institutions:

- (1) organisations which undertake to provide benefits solely in the event of death, where the amount of such benefits does not exceed the average funeral costs for a single death or where the benefits are provided in kind;
- (2) the ‘Versorgungsverband deutscher Wirtschaftsorganisationen’ in Germany, unless its statutes are amended as regards the scope of its capacity;
- (3) the ‘Consortio de Compensación de Seguros’ in Spain, unless its statutes are amended as regards the scope of its activities or capacity.

Subsection 4

Reinsurance

Article 11

Reinsurance

In regard to reinsurance, this Directive shall not apply to the activity of reinsurance conducted or fully guaranteed by the government of a Member State when that government is acting, for reasons of substantial public interest, in the capacity of reinsurer of last resort, including in circumstances where such a role is required by a situation in the market in which it is not feasible to obtain adequate commercial cover.

Article 12

Reinsurance undertakings closing their activity

1 Reinsurance undertakings which by 10 December 2007 ceased to conduct new reinsurance contracts and exclusively administer their existing portfolio in order to terminate their activity shall not be subject to this Directive.

2 Member States shall draw up a list of the reinsurance undertakings concerned and communicate that list to all the other Member States.

Section 3

Definitions

Article 13

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) 'insurance undertaking' means a direct life or non-life insurance undertaking which has received authorisation in accordance with Article 14;
- (2) 'captive insurance undertaking' means an insurance undertaking, owned either by a financial undertaking other than an insurance or reinsurance undertaking or a group of insurance or reinsurance undertakings within the meaning of Article 212(1)(c) or by a non-financial undertaking, the purpose of which is to provide insurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member;
- (3) 'third-country insurance undertaking' means an undertaking which would require authorisation as an insurance undertaking in accordance with Article 14 if its head office were situated in the Community;
- (4) 'reinsurance undertaking' means an undertaking which has received authorisation in accordance with Article 14 to pursue reinsurance activities;

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- (5) ‘captive reinsurance undertaking’ means a reinsurance undertaking, owned either by a financial undertaking other than an insurance or reinsurance undertaking or a group of insurance or reinsurance undertakings within the meaning of Article 212(1)(c) or by a non-financial undertaking, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member;
- (6) ‘third-country reinsurance undertaking’ means an undertaking which would require authorisation as a reinsurance undertaking in accordance with Article 14 if its head office were situated in the Community;
- (7) [^{F1}‘reinsurance’ means one of the following:
- (a) the activity consisting in accepting risks ceded by an insurance undertaking or third-country insurance undertaking, or by another reinsurance undertaking or third-country reinsurance undertaking;
 - (b) in the case of the association of underwriters known as Lloyd's, the activity consisting in accepting risks, ceded by any member of Lloyd's, by an insurance or reinsurance undertaking other than the association of underwriters known as Lloyd's; or
 - (c) the provision of cover by a reinsurance undertaking to an institution that falls within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council⁽¹⁾;
- (8) ‘home Member State’ means any of the following:
- (a) for non-life insurance, the Member State in which the head office of the insurance undertaking covering the risk is situated;
 - (b) for life insurance, the Member State in which the head office of the insurance undertaking covering the commitment is situated; or
 - (c) for reinsurance, the Member State in which the head office of the reinsurance undertaking is situated;
- (9) ‘host Member State’ means the Member State, other than the home Member State, in which an insurance or a reinsurance undertaking has a branch or provides services; for life and non-life insurance, the Member State of the provisions of services means, respectively, the Member State of the commitment or the Member State in which the risk is situated, where that commitment or risk is covered by an insurance undertaking or a branch situated in another Member State;
- (10) ‘supervisory authority’ means the national authority or the national authorities empowered by law or regulation to supervise insurance or reinsurance undertakings;
- (11) ‘branch’ means an agency or a branch of an insurance or reinsurance undertaking which is located in the territory of a Member State other than the home Member State;
- (12) ‘establishment’ of an undertaking means its head office or any of its branches;
- (13) ‘Member State in which the risk is situated’ means any of the following:
- (a) the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same insurance policy;

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- (b) the Member State of registration, where the insurance relates to vehicles of any type;
 - (c) the Member State where the policy holder took out the policy in the case of policies of a duration of four months or less covering travel or holiday risks, whatever the class concerned;
 - (d) in all cases not explicitly covered by points (a), (b) or (c), the Member State in which either of the following is situated:
 - (i) the habitual residence of the policy holder; or
 - (ii) if the policy holder is a legal person, that policy holder's establishment to which the contract relates;
- (14) 'Member State of the commitment' means the Member State in which either of the following is situated:
- (a) the habitual residence of the policy holder;
 - (b) if the policy holder is a legal person, that policy holder's establishment, to which the contract relates;
- (15) 'parent undertaking' means a parent undertaking within the meaning of Article 1 of Directive 83/349/EEC;
- (16) 'subsidiary undertaking' means any subsidiary undertaking within the meaning of Article 1 of Directive 83/349/EEC, including subsidiaries thereof;
- (17) 'close links' means a situation in which two or more natural or legal persons are linked by control or participation, or a situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship;
- (18) 'control' means the relationship between a parent undertaking and a subsidiary undertaking, as set out in Article 1 of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking;
- (19) 'intra-group transaction' means any transaction by which an insurance or reinsurance undertaking relies, either directly or indirectly, on other undertakings within the same group or on any natural or legal person linked to the undertakings within that group by close links, for the fulfilment of an obligation, whether or not contractual, and whether or not for payment;
- (20) 'participation' means the ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;
- (21) 'qualifying holding' means a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking;
- (22) 'regulated market' means either of the following:
- (a) in the case of a market situated in a Member State, a regulated market as defined in Article 4(1)(14) of Directive 2004/39/EC; or
 - (b) in the case of a market situated in a third country, a financial market which fulfils the following conditions:

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- (i) it is recognised by the home Member State of the insurance undertaking and fulfils requirements comparable to those laid down in Directive 2004/39/EC; and
 - (ii) the financial instruments dealt in on that market are of a quality comparable to that of the instruments dealt in on the regulated market or markets of the home Member State;
- (23) ‘national bureau’ means a national insurers’ bureau as defined in Article 1(3) of Directive 72/166/EEC;
- (24) ‘national guarantee fund’ means the body referred to in Article 1(4) of Directive 84/5/EEC;
- (25) ‘financial undertaking’ means any of the following entities:
 - (a) a credit institution, a financial institution or an ancillary banking services undertaking within the meaning of Article 4(1), (5) and (21) of Directive 2006/48/EC respectively;
 - (b) an insurance undertaking, or a reinsurance undertaking or an insurance holding company within the meaning of Article 212(1)(f);
 - (c) an investment firm or a financial institution within the meaning of Article 4(1)(1) of Directive 2004/39/EC; or
 - (d) a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC
- (26) ‘special purpose vehicle’ means any undertaking, whether incorporated or not, other than an existing insurance or reinsurance undertaking, which assumes risks from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the proceeds of a debt issuance or any other financing mechanism where the repayment rights of the providers of such debt or financing mechanism are subordinated to the reinsurance obligations of such an undertaking;
- (27) ‘large risks’ means:
 - (a) risks classified under classes 4, 5, 6, 7, 11 and 12 in Part A of Annex I;
 - (b) risks classified under classes 14 and 15 in Part A of Annex I, where the policy holder is engaged professionally in an industrial or commercial activity or in one of the liberal professions and the risks relate to such activity;
 - (c) risks classified under classes 3, 8, 9, 10, 13 and 16 in Part A of Annex I in so far as the policy holder exceeds the limits of at least two of the following criteria:
 - (i) a balance-sheet total of EUR 6,2 million;
 - (ii) a net turnover, within the meaning of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies⁽²⁾, of EUR 12,8 million;
 - (iii) an average number of 250 employees during the financial year.

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If the policy holder belongs to a group of undertakings for which consolidated accounts within the meaning of Directive 83/349/EEC are drawn up, the criteria set out in point (c) of the first subparagraph shall be applied on the basis of the consolidated accounts.

Member States may add to the category referred to in point (c) of the first subparagraph the risks insured by professional associations, joint ventures or temporary groupings;

- (28) ‘outsourcing’ means an arrangement of any form between an insurance or reinsurance undertaking and a service provider, whether a supervised entity or not, by which that service provider performs a process, a service or an activity, whether directly or by sub-outsourcing, which would otherwise be performed by the insurance or reinsurance undertaking itself;
- (29) ‘function’, within a system of governance, means an internal capacity to undertake practical tasks; a system of governance includes the risk-management function, the compliance function, the internal audit function and the actuarial function;
- (30) ‘underwriting risk’ means the risk of loss or of adverse change in the value of insurance liabilities, due to inadequate pricing and provisioning assumptions;
- (31) ‘market risk’ means the risk of loss or of adverse change in the financial situation resulting, directly or indirectly, from fluctuations in the level and in the volatility of market prices of assets, liabilities and financial instruments;
- (32) ‘credit risk’ means the risk of loss or of adverse change in the financial situation, resulting from fluctuations in the credit standing of issuers of securities, counterparties and any debtors to which insurance and reinsurance undertakings are exposed, in the form of counterparty default risk, or spread risk, or market risk concentrations;
- (32a) ‘^{F2}qualifying central counterparty’ means a central counterparty that has been either authorised in accordance with Article 14 of Regulation (EU) No 648/2012 of the European Parliament and of the Council⁽⁹⁾ or recognised in accordance with Article 25 of that Regulation;]
- (33) ‘operational risk’ means the risk of loss arising from inadequate or failed internal processes, personnel or systems, or from external events;
- (34) ‘liquidity risk’ means the risk that insurance and reinsurance undertakings are unable to realise investments and other assets in order to settle their financial obligations when they fall due;
- (35) ‘concentration risk’ means all risk exposures with a loss potential which is large enough to threaten the solvency or the financial position of insurance and reinsurance undertakings;
- (36) ‘risk-mitigation techniques’ means all techniques which enable insurance and reinsurance undertakings to transfer part or all of their risks to another party;
- (37) ‘diversification effects’ means the reduction in the risk exposure of insurance and reinsurance undertakings and groups related to the diversification of their business, resulting from the fact that the adverse outcome from one risk can be offset by a more favourable outcome from another risk, where those risks are not fully correlated;
- (38) ‘probability distribution forecast’ means a mathematical function that assigns to an exhaustive set of mutually exclusive future events a probability of realisation;

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- (39) ‘risk measure’ means a mathematical function which assigns a monetary amount to a given probability distribution forecast and increases monotonically with the level of risk exposure underlying that probability distribution forecast^{F3};
- (40) ‘^{F2}external credit assessment institution’ or ‘ECAI’ means a credit rating agency that is registered or certified in accordance with Regulation (EC) No 1060/2009 of the European Parliament and of the Council⁽⁴⁾ or a central bank issuing credit ratings which are exempt from the application of that Regulation.]

Textual Amendments

- F1** Substituted by Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast) (Text with EEA relevance).
- F2** Inserted by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).
- F3** Substituted by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

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- (1) [^{F1}Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37)]
- (2) OJ L 222, 14.8.1978, p. 11.
- (3) [^{F2}Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).]
- (4) [^{F2}Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).]

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