Finance Watch

Review of the Markets in Financial Instruments Directive
Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Response by Finance Watch

Note: we believe it is important to answer as directly and as precisely as possible to the questions below.
As a result, the Finance Watch position on MiFID/MiFIR 2 is only partially reflected in this questionnaire.
Finance Watch will be publishing its complete MiFID/MiFIR 2 position in March 2012.

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu **by 13 January 2012.**

Theme	Question	Answers
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	Sub-question 1: In general, the current exemptions seem appropriate. -We would prefer exemptions related to certain Articles, Chapters or Titles of the Directive and Regulation, rather than the current 'blanket' exemptions, i.e. applicable to the whole text. -For example, exemptions for buy-side institutions (e.g. pension funds and insurance companies) and for entities dealing on own account make sense, to the extent that they do not offer investment services *per se* to any third party. -Requiring these institutions to request MiFID authorisation from their competent authorities would create a useless and disproportionate burden. 1) Corporate governance requirements and conflict of interest provisions for these institutions

		should be covered by their respective regulatory environment. 2) Investor protection provisions in the framework of MiFID (i.e. related to investment services) do not apply to them by definition. -But, as per Recital 24 of the Directive, MiFID authorization aims at investor protection AND 'the stability of the financial system'. This point was appropriately highlighted by the EP Resolution of 14/12/2010, §31, requesting that 'significant market participants trading on their own account be required to register with the regulator and allow their trading activities to be subject to appropriate level of supervision and scrutinity for stability purposes'. -What is key, *a minima*, is that the trading activities of the 'MiFID exempt' actors, mostly institutional investors representing substantial volumes and positions, are monitored by the competent authorities (whether they are trading on own account or using the services of an investment firm). This should be achieved via pre- and post-trade transparency imposed on regulated markets and post-trade transparency imposed on OTC transactions. -In particular, the 'registration with the regulator' allowing the proper scrutiny of their trading activity (cf. EP Resolution) should make clear that 'MiFID exempt' firms performing a financial activity are covered by Regulation Articles 22 (obligation to maintain records), 23 (obligation to report transactions – with a lower frequency than MiFID firm), 31-32 (power to ESMA or a competent authority to prohibit or restrict a 'type of financial activity or practice'), 35 (1 a, b and c: ESMA power to limit positions). <u>Sub-question 2:</u> No, we do not see the need to go further in exempting corporate users. The existing exemptions seem generous enough to us. -We would repeat the above comment related to buy-side institutions, for example, for corporations active in or related to the commodities market, that are active in the derivatives markets as a minimum for hedging purposes, but quite often also conducting speculative strategies ('excessive hedging'). As long as they do not manage third parties' capital (but only their own or their subsidiaries'), they should not be 'MiFID authorized'. But their activities and positions should be

		easily and clearly visible to competent authorities to monitor that they are hedging actual underlying positions rather than strictly speculating – and be limited otherwise. See also our response to question 14 (position limits), 24 (reporting technique), 25 (post-trade transparency).
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	Sub-question 1: Yes. -We welcome the inclusion of emission allowances. -We welcome as well the inclusion of structured deposits as a recent form of investment product. Sub-question 2: We have no position at this stage.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	Sub-question 1 (inclusion): Yes. -We strongly support the provisions related to services provided by third country firms, to avoid regulatory arbitrage. Today's regulatory framework on this topic differs from one Member State to the other. It should be harmonized. Sub-question 2 (principles): -We support the principle that any third country firm providing services to retail clients (see question 18) should establish a branch in the Union. -We believe the provisions related to the authorization of a branch (Article 41) are satisfactory. Sub-questions 3 (precedents) and 4 (why): We have no position at this stage.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and	-We think the underlying ambition of the new Articles 9, 48 and 65 is very appropriate given the obvious and documented failures of proper corporate governance as partial causes of the recent financial crisis. We would complement the proposed provisions with important missing elements, and further insist on some existing provisions. -Information on corporate governance practices, as described in the Directive, should be made publicly available on a regular basis. Such information is of high interest

	why?	to the firm's stakeholders: employees, clients, providers, partners and, indeed, society as a whole, being part of the 'ecosystem' in which the firm operates. -Related to the management body, reference should be made to the need for coherence between the promotion of integrity principles and remuneration, which is often strictly determined by contribution to the firm's return on equity. -Generally speaking there is a lack of emphasis on (or bare mention of) an effective and constructive dialogue between employees or their representatives and management. Not only is efficient top-down communication needed to promote integrity as well as performance, but bottom-up communication is needed a) via employees' representation within the management body to ensure that practical obstacles to proper behaviour are reported (insufficient staffing, lack of proper training, contradictory injunctions on expected results, etc.) and b) via whistle-blowing procedures to report breaches of appropriate behaviour. -It should be mentioned that it is the responsibility of the management body to ensure that employee remuneration schemes are not in contradiction with the promotion of integrity in general, and investor protection in particular. For example, sales targets should be carefully balanced with the duty for employees to comply with their obligation to perform a fair assessment of suitability and appropriateness.
Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalizers in the proposal? If not, what changes are needed and why?	Sub-question 1 (appropriate definition and differentiation): No. -We strongly support the Commission's ambition (Regulation Recital 7) to a) regulate broker crossing systems and b) bring more of the current OTC derivatives transactions to regulated venues. -However, we are not convinced that an additional trading venue category is necessary to achieve that ambition. Furthermore, we think the current proposal could likely have effects contrary to the ones desired, mentioned as a) and b) above (see also next question). The further fragmentation of 'lit' liquidity (by allowing new venues to be added next to existing ones) should be thoroughly considered. -The new OTF category largely overlaps with existing Regulated Markets and Multilateral Trading Facilities but grants extra privileges (i.e. lesser regulation) in

		the form of a) discretionary execution of orders and b) discriminatory access (the latter 'privilege' being granted to Systematic Internalizers as well). -There is a clear risk that the new OTF category will simply attract volumes away from regulated venues (RMs and MTFs), while not reducing OTC and dark volumes. <u>Sub-question 2 (changes required):</u> -If OTFs are to bring any additional value to the current categories, they should be defined explicitly and positively. The existing definition is strictly negative: Regulation Article 2, 1. (7): 'any system or facility which is not a regulated market or MTF'; Directive Article 20 (2): 'A request for authorisation as an OTF shall include a detailed explanation why the system does not correspond to and cannot operate as a RM, MTF or SI'. - In any case, provisions related to conflict of interest for MTFs (Directive Article 19, 3.) should be replicated as such in the requirements for OTFs (i.e. in Article 20). If this is a voluntary omission, it should be justified. -We would recommend, in line with and based on the principles put forward by the EP Resolution of 14/12/2010 (I, J, K, L), a more thorough assessment of the need to introduce a new type of venue (answering the question: what trading practices, related to equity and non-equity instruments, do not fall under the existing categories). In parallel, there should be more focus on a precise and restrictive definition of OTC – enforcing the migration to the lit space of transactions that do not meet the definition's criteria.
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	<u>Sub-question 1 (OTC definition):</u> -We would base a definition of OTC trading on the following principle: all transactions should take place on a regulated trading venue and cleared centrally, except in cases where such 'lit-trading' is detrimental to a sound price formation process (e.g. large-in-size transactions). In other words, the driver for trading OTC should not be to benefit from (and maintain) a privileged position. <u>Sub-question 2 (channelling OTC trading onto organized venues):</u> Probably not. -We regret the current lack of ambition to limit to the strict minimum all OTC

		transactions, across instrument types. This is reflected by the fact that only OTC derivatives transactions are defined. OTC figures on equity markets are famously disputed. What is little disputed is that the percentage of OTC and dark transactions has significantly increased since MiFID 1, which is both detrimental to the price formation mechanism of financial markets and has the most negative effect on retail investors, to the benefit of professional intermediaries. -As long as there is no clear definition of OTC combined with an obligation to move to lit markets, except for derivatives, we do not see any reason why the proportion of OTC transactions should decrease at all for other asset classes.
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	-'Risks involved' are dual, as summarized in Recital 48: 'automated trading' should not 'create a disorderly market and cannot be used for abusive purposes'. -We believe the first risk (disorderly markets due to malfunctioning technology), is properly covered by the requirements in the Article mentioned (including clause 3 of Article 17, aimed at avoiding sudden massive withdrawal of liquidity). -We understand that the second risk (the use of automated trading for abusive purposes) is addressed by the 'liquidity-providing obligation' (clause 3 of Article 17) – and should obviously be covered by MAD-MAR. -We believe this second risk is even more worrying than the first one. Furthermore, we believe high frequency trading in general (with notable exceptions) increases volumes traded, but does not increase actual liquidity. By definition, high frequency trading that provides liquidity should not be opposed to a liquidity-providing obligation that will only codify its existing practice, provided this obligation is formulated in a realistic manner. Thus we can only support the principle of the liquidity-providing obligation proposed by the Commission. -Importantly, we would however challenge the current formulation of this obligation, in order to make it technically realistic. That is, it should reflect standard market practices in liquidity providing obligations (typically agreed between market makers and trading venues). For example, the 'continuous operation' clause is not tenable for liquidity providers if it means '100% of the time'. Similarly, 'regardless of prevailing market conditions' is not realistic and should be adapted

		to reflect current market practices as described in existing liquidity provider agreements. -Furthermore, we believe that the ambition of the EP as reflected in its above-mentioned Resolution (§ M, N, 18-22) has not been properly taken into account – and should be.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	-We believe the requirements in the Article mentioned do address the risks involved.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	-We welcome the provisions contained in Regulation Article 22. Increased capacity of regulators to anticipate risk will be facilitated by the availability of sufficient historic data. -As mentioned in our answer to question 1, the obligation to keep records of all trades should apply to any entity trading in markets in financial instruments, even if MiFID exempt.
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	-We strongly support the aim to reduce OTC derivative transactions (Regulation Articles 24 to 26), in line with G20 recommendations and numerous, widely valued academic and other analyses. -However the current wording of Article 26 – the 'sufficiently liquid' clause in particular – is too generic to assess whether the aim will be met, which is worrying. ESMA implementing technical standards will be key in this regard. But the text of the regulation should be more explicit in its ambition related to the 'trading obligation': the only economic justification for a derivative transaction to remain OTC is the tailor-made/bespoke nature of the derivative instrument traded. All plain vanilla derivatives should be traded on organised venues. -It is often argued that derivatives are complex instruments with an ad hoc structure

		designed to meet the hedging needs of a specific investor in a specific situation. While this is true, it should be noted that the benefits expected from the relative standardization of these instruments (i.e. market transparency and integrity) outweigh by far the advantages of customization and that the bulk of OTC derivatives dealing is done in so-called "exchange look-alikes", meaning that their characteristics would have enabled them to be traded on an organized venue.
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	-Probably not. -We support the ambition to allow SMEs to gain better access to capital markets. MTFs dedicated to SMEs are a step in the right direction. -However in the absence of sufficient incentives for market players, and brokers in particular, to support the creation and operation of such markets, the proposed MTF SME category might not meet significant success, i.e. generate sufficient traction to offer significant new capital raising opportunities to SMEs.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	-We support the provisions contained in Regulation Title VI and Directive Article 57. Market infrastructures have proven their positive contribution to market safety and integrity – via their capacity to absorb financial shocks at the heart of a crisis. EMIR will only increase their systemic role. Hence the need for the above-mentioned provisions.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any	-As abundantly documented by certain specialized non-governmental associations, the need for position limits in commodities and commodities derivatives markets is urgent. -There is no problem *per se* with some speculative behaviour related to commodities derivatives as long as this behaviour, properly contained, brings 'oil to the machine' of hedging (for corporate end-users).

	changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	-The real problem is the financialization of commodities, i.e. the creation of 'synthetic' financial products meant to speculate on commodities markets. Over the past years, those products have been sold massively to investors, be they institutional or retail investors which has created huge distortions in commodities markets. -Thus we support the current Directive Article 59. But it is weakened by the 'alternative arrangements with equivalent effects' provision – as such arrangements are currently not defined. -Explicit emphasis should be put in Article 59, §1 on the fact that the commodity derivatives markets' 'raison d'être' is hedging actual underlying positions, not speculation – as the latter has proven so damaging for society as a whole, inside and outside Europe (with regard to food derivatives, in particular). -For that purpose, Directive Article 59, §1. should allow for limits to be imposed on individual traders, categories of traders, as well as in the market overall, based on a percentage of the underlying market. -We support measures contained in Regulation Article 35, granting ESMA position management powers. However, for these measures to reach their target, § 3 (a) should explicitly mention the limitation to hedging purpose. And § 3 (c) should be removed, as it brings little value, while risking undermining the effectiveness of powers granted to ESMA.
Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	-In general, no. -We support the logic underlying the banning of inducements in the case of independent advice and portfolio management (Article 24). We would only stress that the business model including commission and fees to professional intermediaries is applied to many other services and activities. We would thus prioritise an approach whereby the potential conflicts of interest linked to this business model are addressed 'globally' (across services/activities), keeping in mind the economic impact on small investors and retail clients – i.e. avoiding that they cannot afford these services and activities any more. -The current proposal would only partially address the issue, if it does at all. Indeed an

		'independent' advisor can easily stop calling himself 'independent'. A basic principle should be put forward in the discussion around the above-mentioned business model: an intermediary receiving commissions or fees is a 'seller', not an 'advisor'. -A missing element to the new requirements (see question 5 above) is the potential conflict of interest linked to sales targets imposed on sales officers/employees. The pressure related to these targets might bring situations where appropriateness and suitability tests (Article 25) are neglected – and should thus be reflected in Article 23 (conflict of interest). -Importantly, financial services unions provide shop floor/real-life evidence of a significant proportion of employees being unable to cope properly with investor protection provisions and reporting due to lack of time (increased regulatory obligations without increase in staff) and proper training.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	-This will largely depend on the guidelines developed by ESMA as to what is a 'structure that makes it difficult for the client to understand the risk involved' (§ 7.) -It should be noted at this stage that it is not appropriate to limit the definition of 'complex UCITS' (§3, a, iv) to 'structured UCITS' (Commission Regulation 583/2010). Many UCITS that do not match the criteria for 'structured UCITS' are nevertheless 'difficult for the client to understand'.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	-We welcome the inclusion of execution quality in the reporting by trading venues and investment firms, increasing price transparency for investors. Provisions included in Article 27 seem satisfactory.
	18) Are the protections available to eligible counterparties, professional	-In general, yes. -The particular case of public (in particular local) authorities should be considered

	clients and retail clients appropriately differentiated?	carefully. As demonstrated by the heavy losses suffered by many local authorities in different European countries following the sale of irresponsible structured financial products, the benefit of considering those authorities as retail rather than professional clients should be considered. Such benefit should be measured against the potential cost and administrative burden for all parties.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	-If any adjustments are needed to Regulation Articles 31 and 32, they should aim at avoiding a watering down of ESMA's new powers, which are very much welcome in view of the recent obvious inability of major financial market players to self-regulate (i.e. avoid that their practices put market integrity and stability at risk). -We believe that the ability to intervene on products directly when necessary should be a mandate for ESMA, rather than a mere 'power at disposal'.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	-We support an increase in pre-trade transparency as a key element of the price formation mechanism, and a guarantee for fair markets. -The fragmentation of trading venues has made it more difficult (and costly) for investors to obtain a complete and accurate picture at a given time. Firms with the means to invest in data consolidation and monitoring across venues are in a privileged position, which should be balanced by easier and better access for all parties. -'Consolidated quote solutions' should be explicitly supported in the Regulation – reference can be made to the US, where a 'Consolidated Quotation System' functions in parallel, and much the same way, as a 'Consolidated Tape System' (whether the business model supporting such solution is 'utility' or 'commercial'). -It is not acceptable that a 'virtual' 'pan-European best bid and offer (EBBO) be only available to dominant actors (each of them consolidating pre-trade data for their own purpose), as is the case today.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all	-The structure of these markets (nature of the demand, structure of the offer/intermediation) should result in a differentiated approach to pre-trade transparency. This is a very technical debate, initiated by CESR and that should

	organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	be pursued by ESMA. -We consider that an efficient post-trade transparency mechanism (Regulation Article 9) would already be an important step in bringing more light to and control over these markets.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	See question 21.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	-Current waivers, de facto creating dark pools, are too flexible and detrimental to the efficiency of the price formation process. -The effectiveness of Regulation Articles 4 and 8 – i.e. a definition of waivers that is not detrimental to the principle of pre-trade transparency – depends too much on the content of the delegated acts. -The discussion around waivers definition should be related to the definition of OTC (see questions 7.) -In any case the application of pre-trade waivers should be strictly coherent across member states, under ESMA supervision.

	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	-We believe the data service provider provisions are of utmost importance if we want MiFID to contribute to safer, more transparent financial markets, based on the proper level of oversight. -We regret that the current proposal, with regards with a Consolidated Tape Provider (CTP) in particular, is too weak. -We support the creation of a European CTP. An efficient commercial solution, available at a reasonable price, is acceptable. If such solution is not delivered shortly for any reason, a 'public utility' model should be pushed forward. The priority is to avoid having several CTPs, each of them collecting the data flows from Authorised Publication Authorities (APAs). -ARMs will be key to providing competent authorities with the data necessary to fulfil their mission. Data aggregation at European level should be explicitly foreseen to support ESMA in its functions. It should possible for authorities to trace all transactions and positions of any party active in financial instruments (MiFID authorized or MiFID-exempt, cf. question 1).
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	-See also question 24. -Post-trade transparency should be consolidated, exhaustive and as close to real-time as possible to support a sound price formation mechanism and allow supervisors to better foresee any risk related to the activities of investment firms (similar to those that led to the recent financial crisis). -Consolidation and format harmonization should be a core principle of post-trade transparency. Standardization mechanisms should be defined to ensure maximum transaction traceability.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	

	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	-We see two challenges facing authorities for MiFID/MiFIR 2 to be properly supervised and enforced: the need for substantial and skilled human resources and the capacity to consolidate, treat and analyse large amounts of data (which requires a very specific methodology, appropriate tools and experienced 'data intelligence' practitioners). -Our view is that the current text does not provide sufficient guarantee allowing competent authorities to fulfil their role. -If not addressed, this situation could lead to a serious threat to the very ambition of the MiFID/MiFIR 2 package. -This is valid in particular for ESMA, in its role of leadership on supervisory practices and harmonization across Europe (to avoid any regulatory arbitrage), and as the guardian of the stability and integrity of European markets in financial instruments. We believe the latter function is not supported by a proper ambition in the current proposal, in particular with regards with the two above-mentioned challenges (skilled resources and capacity to centralize and manage data flows).
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	-Blanket exemptions under EMIR should not automatically guarantee similar exemptions under MiFID (and other forthcoming legislation such as UCITS V).
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	-The look-through approach proposed by the U.S. authorities under the Dodd-Frank act provides a more exhaustive method to bring all commodities traders under supervision than the MiFID approach, which puts obligations on exchanges. The risk of having a different approach on both sides of the Atlantic is to open the opportunity of regulatory arbitrage. In order to avoid that situation, the EU could seek to adopt a similarly ambitious approach to commodities speculation.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive	-No. The fact that the Market Abuse Directive is partly transformed into a Regulation is a symptom of the on-going problems with harmonised application and

	effective, proportionate and dissuasive?	enforcement of EU legislation. Sanctions should be harmonized beyond "minimum maximum" requirements to provide a sufficient deterrent. In addition, the enforcement could be ineffective as market authorities will be limited in the number of cases they can handle due to the technical difficulty of gathering evidence on many of the new provisions in MiFID. The Parliament should consider calling for a horizontal sanctions regime (possibly including criminal law) to be put back on the Commission's drafting board.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	-We feel that too much is currently left to Level 2 to allow for proper democratic and transparent debates on means versus objectives. Independently, staffing and budgets of all ESAs must be significantly improved.
Detailed comments on specific articles of the draft Directive		
Article number	**Comments**	
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Detailed comments on specific articles of the draft Regulation		
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