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THE LAWREVIEWS

UKRAINE

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I INTRODUCTION

In line with Ukraine's efforts to create a single economic and social space with the European Union (EU), Ukrainian legislation is undergoing fundamental changes aimed at harmonisation with that of the EU law. Concurrently with the ratification of the EU Association Agreement by Ukraine and all 28 Member States of the EU (with the Netherlands being the last to ratify on 1 June 2017), which is expected to enter into full force on 1 September 2017, substantial reforms of Ukrainian laws and regulations in tax, corporate and banking spheres are taking place. This is creating new incentives both for Ukrainian businesses in Europe and for foreign investors in Ukraine.

On 11 June 2017, the decision of the Council of the European Union to introduce a visa-free regime for Ukrainian citizens to travel to Schengen Zone member states became effective. A visa-free regime allows holders of Ukrainian biometric travel passports to travel without a visa to almost all EU Member States, for no more than 90 days during any 180-day period. The visa waiver approved by the EU also covers four countries that are not members of the EU, namely Norway, Iceland, Liechtenstein and Switzerland, but excludes the United Kingdom and Ireland as they are not part of Schengen arrangements.

One of the most significant steps in the anti-money laundering direction has been the establishment in 2015 of the Ukrainian National Anti-corruption Bureau (UNAB) and National Agency on Corruption Prevention (NACP). A Specialised Anticorruption Court is also anticipated as the final stage of anti-corruption and judicial reforms in Ukraine.

An electronic declaration system for politically exposed persons (PEPs) and persons authorised to perform state or local government functions was successfully launched at the end of 2016.

In line with recent global trends, Ukraine is seeking to increase transparency and accountability within its business structures. As part of this process, Ukraine has introduced a public register of ultimate beneficial owners (UBOs) of corporate bodies. Furthermore, in line with the global deoffshorisation drive, Ukraine has joined the Inclusive Framework on OECD Base Erosion and Profit Shifting (BEPS) project, which provides for the implementation of the minimum four BEPS standards. In 2016, the President of Ukraine issued a decree establishing a working group for the preparation of draft laws on counteracting the reduction of the tax base and the transfer of profits abroad. At time of publication, the list of draft laws to improve procedures for control over transfer pricing and transfer of income abroad, introduce rules for controlled foreign companies (CFC), counteract

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aggressive tax planning, and liberalise currency control regulations in Ukraine were prepared, but no significant movements have yet been made to implement these draft laws. However, Ukrainian fiscal authorities and the country's banking regulator are still advocating adoption of anti-BEPS measures (even beyond the minimum standard, including introduction of the CFC regime) as well as implementation of the OECD Common Reporting Standard (CRS) for automatic exchange of information. In addition, in 2017, Ukraine and the USA signed an Intergovernmental Agreement Implementing the Foreign Account Tax Compliance Act (FATCA).

In 2017, the National Bank of Ukraine (NBU) considerably liberalised Ukrainian currency regulations by undertaking steps to improve conditions for conducting foreign economic activity by Ukrainian individuals and business entities.

Another substantial factor influencing Ukrainian legal reforms is the Extended Fund Facility (EFF) between Ukraine and the International Monetary Fund (IMF), approved on 11 March 2015 by the IMF Executive Board. In accordance with the EFF, Ukraine is obliged to implement a number of fiscal, economic and legislative measures under IMF supervision. In compliance with the EFF, significant changes were introduced to regulation of the banking and energy sectors, anti-money laundering regime, the fight against corruption and investor protection. These reforms seek to introduce recognised international standards (including those of the IMF, the EU and Financial Action Task Force (FATF)) in these areas.

In recent years, Ukrainian businessmen have been primarily focused on effective wealth protection and management mechanisms. The ongoing conflict in the Eastern Ukrainian regions of Donetsk and Luhansk and substantial levels of corruption continue to make wealth preservation and protection the number one priority.

II TAX

Taxation of individuals in Ukraine depends on tax residence, source and type of income.

i Tax residency

The Tax Code of Ukraine (the Tax Code) provides the following residency tests to determine an individual's tax residency: (1) residence (permanent residence in Ukraine for a period exceeding 183 days in a calendar year); (2) centre of vital interests (close economic and personal ties); and (3) citizenship.

Registration of an individual as an entrepreneur in Ukraine is also sufficient to recognise this individual as a Ukrainian tax resident. In addition, an individual may voluntarily accept to become a tax resident in Ukraine in accordance with the procedures set out in the Tax Code.

Despite the above rules, in practice the main test to determine tax residency regularly applied by Ukrainian tax authorities is the number of days spent by an individual in Ukraine in a calendar year.

For the purposes of the Tax Code, any person who fails to qualify as a Ukrainian tax resident is considered a non-resident of Ukraine for tax purposes.

ii Source of income

Tax residents of Ukraine pay tax on their aggregate worldwide income. Non-residents pay tax on Ukrainian-sourced income only. Non-resident individuals are not eligible for certain deductions and exemptions available to residents for personal taxation purposes.

iii Types of taxable personal income

The Tax Code recognises both monetary and non-monetary personal income.

The Tax Code provides for the following taxable types of personal income (irrespective of residency): employment income, interest and dividends income, gifts, inheritance, investment income, insurance payments, rental income, fringe benefits, amounts of punitive damages paid, and written-off payment obligations to third parties etc.

The Tax Code specifically excludes certain types of income from the taxable basis of both residents and non-residents.

In addition, certain categories of low-income taxpayers are entitled to reduce their respective incomes by the amount of the 'social tax benefit'.

The Tax Code prescribes that if so provided by the respective international tax treaties, the amount of tax paid by a tax resident outside Ukraine can serve as credit against taxes payable in Ukraine. This applies provided the taxpayer submits a written confirmation from the foreign tax authority acknowledging that such foreign taxes have, in fact, been paid. However, the total amount of any foreign tax credit may not exceed the total amount of personal income tax (PIT) due in Ukraine.

iv Rates

In 2016, a flat rate of 18 per cent PIT was introduced for most types of income for both residents and non-residents.

Interest and royalties are generally taxable at the rate of 18 per cent. Dividends received by individual residents are taxed at different rates, namely: (1) dividends distributed by Ukrainian companies that are subject to corporate income tax are taxed at 5 per cent; (2) dividends distributed by Ukrainian companies that are not subject to corporate income tax (i.e., using simplified taxation system), as well as collective investment arrangements and non-resident entities are taxed at 9 per cent.

Income derived from disposal of real estate is taxable at the rate of either zero per cent or 5 per cent depending on: (1) the type of property; (2) the frequency of disposals; and (3) the duration of the seller's title to such property. However, disposal of real estate in Ukraine made by a non-resident and disposal of real estate abroad made by Ukrainian resident are taxable at the rate of 18 per cent.

The standard rate for the disposal of moveable property (such as vehicles) is 5 per cent. A single disposal of a car or a motorcycle within a year is non-taxable. An 18 per cent tax rate applies to a non-resident's income from the disposal of moveable property in Ukraine.

v Gift and succession taxes

Gifts and inheritance are taxable and both are subject to the PIT at the rate of zero per cent, 5 per cent or 18 per cent. The exact rate depends on the residency status of the donor or the testator and on the degree of relation between the donor or the testator and the recipient or the heir (varying from zero per cent for spouses and close relatives (parents and children, grandparents and grandchildren, brothers and sisters), to 18 per cent for inheritance or gifts received from or by non-residents).

Tax residents shall pay PIT on inheritance and gifts irrespective of the location of the acquired assets.

vi Assets tax

Currently the tax code has a consolidated assets tax that consists of land tax, non-land real estate tax and transport tax.

Land tax is payable by individuals holding title to or right of permanent use of land plots in Ukraine irrespective of their tax residency. Particular land tax rates are determined by the municipal authorities and shall not exceed 12 per cent of the cadastral value of a land plot depending on the type of the land plot and the particular rights of its holder (i.e., either title to or the right of permanent use). The Tax Code provides for a number of tax exemptions regarding land tax depending, *inter alia*, on the status of the individual, type of land plot, its area and the purpose of its use.

Residual and non-residual real estate owned by an individual is subject to a non-land real estate tax. The tax rates are set forth by the municipal authorities but shall not exceed 1.5 per cent of the minimum wage per square metre. At the same time, the Tax Code sets forth certain exemptions for the real estate tax (e.g., a minimum real estate area not subject to the real estate tax).

The first 60 square metres (for an apartment), 120 square metres (for a house) or 180 square metres (where the same person owns an apartment and house) are exempt from taxation. This exemption applies only once irrespective of the number of owned properties.

If a taxpayer owns an apartment of more than 300 square metres or a house of more than 500 square metres, the amount of tax due increases by 25,000 hryvnia.

Owners of vehicles registered in Ukraine with an age of less than five years and average market value exceeding 750 times the minimum wage are subject to a transport tax of 25,000 hryvnia per vehicle. The average market value for each vehicle type is determined by the Ministry of Economic Development and Trade of Ukraine.

vii Military duty

To provide the armed forces with funding in view of the ongoing armed conflict in Eastern Ukraine, Parliament has introduced a military duty. Military duty is levied on Ukrainian-sourced income of non-residents and on the worldwide income of Ukrainian tax residents at the rate of 1.5 per cent.

viii Issues relating to cross-border structuring

Ukraine has a wide network of double taxation treaties with approximately 70 countries. In 2017, double taxation treaties with Malta and Luxembourg were finally ratified and are expected to enter into force from 2018. The ratification of amending protocol to the double taxation treaty with Cyprus is pending. The majority of the double taxation treaties entered into by Ukraine are based on the OECD model.

While considering trans-border structuring options, Ukrainian private businesses currently focus on such jurisdictions as the Netherlands, Estonia, Hungary, Slovakia, Latvia and the UAE due to the favourable provisions of the respective double taxation treaties between Ukraine and these countries. Cyprus remains one of the most popular and attractive cross-border structuring options for the majority of Ukrainian businessmen in tax planning and private wealth protection and preservation. However, interest in structuring through the Netherlands, Estonia, Hungary, the UAE and other jurisdictions with favourable tax regimes (e.g., Malta and Luxembourg taking into account recent ratification of the double taxation treaties) for holding, financial and operational companies will continue to grow for the observable future.

Cross-border transactions of Ukrainian companies with non-resident entities are, under certain conditions, subject to transfer pricing rules (TP rules). In general, TP rules apply primarily to transactions with related counterparties. However, they may also apply to transactions between unrelated entities, when, for example, a foreign entity is a tax resident of a 'low-tax' jurisdiction or incorporated in a certain legal form allowing such entity not to pay taxes in the jurisdiction of incorporation (this mainly refers to tax transparent entities such as UK partnerships or limited liability partnerships).

Ukrainian TP rules are based on OECD Transfer Pricing Guidelines. These regulations require that prices for goods and services in certain transactions shall be set on the arm's length principle.

The TP rules apply provided that the following criteria are met: the total taxable income of the respective Ukrainian taxpayer exceeds 150 million hryvnia and the volume of such transactions with any particular counterparty exceeds 10 million hryvnia (exclusive of VAT) in the relevant calendar year (each such transaction is a 'controlled transaction'). Ukrainian taxpayers are required to report all controlled transactions to the tax authorities on an annual basis.

Based on such reporting as well as on their own monitoring and tax audits, Ukrainian tax authorities have the ability to make transfer pricing adjustments and impose additional tax liabilities in respect of the controlled transaction if the terms and conditions of a particular controlled transaction are not on an arm's-length basis.

III SUCCESSION

Rules governing succession are incorporated in the Sixth Book (Chapter) of the Civil Code of Ukraine (the Civil Code). Conflict of law issues arising out of and connected with succession are set forth in the Law on Private International Law. Useful guidelines on the application of the succession legislation are outlined in the Letter of the High Special Court of Ukraine on Civil and Criminal Cases on court practice in succession cases dated 16 May 2013.

Following Roman civil law traditions, succession in Ukraine is regulated either by way of testament or pursuant to the provisions of the Civil Code (succession by law).

A testator's estate is defined as all the testator's rights and liabilities remaining in force after his or her death.

The death of the testator triggers probation. Within six months of the commencement of the probation, the heirs may either execute or renounce their rights to succession.

Transfer of title to heirs is effected on the basis of a certificate of inheritance issued by a notary or, in rural settlements, by the authorised officer of municipal government body, upon expiration of a six-month probation period. Issuance of a certificate is mandatory for immovable property, while for moveable property it is optional (though highly recommended).

i Intestacy rules

Inheritance by law arises if a testator leaves no valid will and testament. Inheritance by law rules will also apply if the testator has left a will but it was successfully challenged by heirs or if the inheritance was renounced by heirs.

There are several lines of priority of succession. The testator's estate is distributed among the heirs of each priority line (i.e., the heirs of each priority line exclude the members of the

next lines). This order of succession may be changed upon written and notarised agreement between the heirs when such agreement does not infringe the rights of the heirs that are not parties thereto.

The principle of representation applies (i.e., in case of the death of an heir of the first priority line (e.g., the testator's son) his or her heirs will have the right to their share of the inheritance).

The Civil Code intestacy rules provide that only individuals may inherit by law. The right to succession may be executed by an heir upon provision of evidence of his or her relations with the testator (e.g., birth or marriage certificate). The heirs of the same priority line inherit the testator's estate in equal shares; however, they may enter into a separate agreement and decide to distribute the testator's estate among themselves.

ii Inheritance by will

The Civil Code sets out strict requirements regarding the form of the will. It shall be made by a testator in writing with a statement of the date and place of making a will, with further notarisation and registration. The testator may define as heirs either individuals or legal persons. Only adult persons of full legal capacity may execute a will (they must be 18 years old (or in certain cases 16) or over, and with full mental capacity).

A testator may set out in a will any additional bequests in favour of any designated person (e.g., the right to abide in the inherited real property). The testator may also determine certain preconditions or conditions for his or her heirs to satisfy in order to receive the right to inheritance (e.g., residence in certain place, certain age, etc). However, such preconditions must not contradict the law or principles of public morality.

A document executed in breach of will execution rules set out in the Civil Code or by a person lacking full legal capacity is deemed void *ab initio*.

A will is deemed void when there is evidence that the testator has executed the purported will, either by coercion or as a result of fraud. Upon a claim by the interested person, such a will may be declared void by court decision.

Spouses may draft a joint will. Apart from a will, a testator may also enter into a succession agreement under which the acquirer obliges to undertake certain actions prescribed by alienator (testator) in return for ownership rights to the testator's estate.

iii Mandatory inheritance

The testator's right to choose heirs is limited by provisions of Article 1241 of the Civil Code, which guarantees that underage or disabled children, spouses and parents shall, in any case, inherit at least half of the portion they would have received in the absence of the last will. Under Ukrainian law, the definition of a 'disabled person' covers both persons with disabilities and retired persons.

iv Conflict of law issues

As a general rule, succession is governed by the law of the country of the last residence of the testator (i.e., if a citizen of Romania resides and dies in Ukraine the applicable law is that of Ukraine). However, if a testator executes a will, he or she can choose his or her *lex patriae* (e.g., in the case of a Hungarian testator – the law of Hungary).

There are, however, certain overriding provisions of *lex specialis*. The form of the act shall correspond to the requirements of the law of the place (country) of the testator's death. However, the will may not be declared void on the basis of error in form if it corresponds to

the law of the country where the testator's immovable property is situated, the *lex patriae*, the law of the country of the last residence, or the law of the country where the will was executed, whichever is applicable.

Transfer of title to immovable property shall be governed by the law of the state where such immovable property is situated.

v Matrimonial rules

In recent years, no substantial amendments were made to the Family Code of Ukraine (the Family Code), the act governing matrimonial relations in Ukraine. Same-sex marriages are not recognised by the Family Code and their official recognition is unlikely in Ukraine in the foreseeable future.

The Family Code provides for tenancy-in-common of the spouses' property with certain exclusions (e.g., personal belongings, property acquired before the marriage, etc). This regime can be changed by way of a prenuptial agreement. Prenuptial, maintenance and alimony agreements must be executed in writing and notarised. However, there is no developed case law in Ukraine regarding such agreements. Difficulties may arise in the case of foreign spouses and with conflict of law issues.

IV WEALTH STRUCTURING AND REGULATION

i General overview of private wealth regulation

None of the forms of legal entities provided by Ukrainian corporate legislation may be viewed as specifically designed for private wealth management purposes. Trusts and foundations are generally not recognised in Ukraine, though the relevant terminology sometimes appears in legislation.

The year 2016 brought more significant regulatory developments aimed at establishing economic and financial transparency. Substantial changes were introduced to the regulation of the banking sector, which directly affected wealth management and assets protection.

ii Beneficial owners' disclosure requirements

In mid-2015, requirements governing the disclosure of the UBOs of Ukrainian legal entities were introduced. Current Ukrainian legislation provides that all legal entities in Ukraine shall file with the State Registry of Legal Entities and Private Entrepreneurs of Ukraine (the State Registry) their legal and beneficial ownership information. The filing requirements do not cover legal entities whose shareholders are exclusively individuals.

Once filed at the State Registry, the UBOs' personal data (including full name and place of residence) becomes publicly available from the webpage of the State Registry.

The definition of the UBO included into the AML Law (as defined below) covers both shareholding and dominant control tests endorsed by the FATF in the 2014's Guidance on Transparency and Beneficial Ownership. Moreover, nominee shareholders may not be registered as the UBOs of Ukrainian legal entities.

Failure to file information on the UBO is sanctioned by a fine (up to 8,500 hryvnia) imposed on the management of Ukrainian corporate bodies.

Currently, Ukrainian legislation does not provide for any specific rules regarding controlled foreign companies (CFC). However, in line with the global deoffshorisation drive, and following Ukraine's accession to BEPS, the relevant draft CFC law has been prepared, though it is yet to be considered by the Ukrainian Parliament.

iii New requirements of the National Bank of Ukraine

In 2014, the NBU started to develop a strategy for Ukrainian banking sector reform with the principal goal of securing greater transparency, sustainability and stability. Following the IMF's recommendations, the NBU has substantially amended legislative requirements for Ukrainian bank owners and ownership structures. At the time of writing, the NBU has already liquidated more than 90 banks, which at the beginning of 2014 represented almost half of the banking system of Ukraine.

The NBU continues to liberalise quite strict currency control regulations. In particular, it is no longer required either for individuals or for legal entities to obtain an individual licence from the NBU for opening a foreign bank account or making an investment abroad, provided the funds transferred to a foreign bank account or the funds for such an investment are held abroad and not transferred from Ukraine.

Since 12 June 2017, legal entities on the basis of an individual licence have an opportunity to invest abroad up to US\$2 million (or its equivalent) during one calendar year. Previously the limit for total amount of such transactions was up to US\$50,000 per calendar month.

Furthermore, Ukrainian residents (individuals) now have the opportunity to obtain an electronic licence from the NBU for making foreign investment or transfer or deposit to their foreign bank accounts of up to US\$50,000 during one calendar year. This procedure is much simpler than the procedure of obtaining a paper licence as envisaged in the past.

iv Anti-money laundering and anti-corruption regime

The Law on Prevention and Counteraction to Legalisation (Money Laundering) of the Proceeds from Crime, Terrorism Financing, as well as Financing of the Proliferation of Weapons of Mass Destruction (the AML Law) together with the Criminal Code of Ukraine (the Criminal Code) is the primary regulatory anti-money laundering act in Ukraine.

In line with the EFF the AML Law aims at compliance with the principal FATF recommendations (including 40 Recommendations) on combating money laundering and terrorist financing.

Ukraine's anti-money laundering regime includes a two-level strict monitoring system over financial operations performed by residents and non-residents of Ukraine. Initial financial monitoring (identification of a client, details of and grounds for particular financial operation, etc.) of financial operations is conducted by intermediaries, including: banks, insurance (and reinsurance) companies, other financial institutions, stock and commodities exchanges, professional members of the security market (e.g., brokers, dealers), notaries, auditors and individuals rendering accounting services, lawyers and other persons providing legal services, etc., (the initial financial monitoring performers).

The AML Law, *inter alia*:

- a* allows outsourcing of client identification or verification to a third party;
- b* authorises the initial financial monitoring performers to require a client to provide its ownership structure in order to enable them to determine the beneficial owners of the client;
- c* introduces financial monitoring with respect to national or foreign politically exposed persons and officials of international organisations, establishes a high-level risk for operations involving (or carried out in the interests of) politically exposed persons or officials of international organisations and provides for additional measures of financial monitoring for clients with a high level of risk; and

- d* clarifies the legal basis for the termination of relationships with a client by the initial financial monitoring performers in case the identification or verification of a client is not possible.

The AML Law also provides for the formation of a national analytical database that may be used by the law enforcement agencies of Ukraine and other countries for the purposes of identification, examination and investigation of crimes related to money laundering and other illegal financial transactions.

The major authority with the powers of general supervision of the financial monitoring system is the State Service for Financial Monitoring of Ukraine (the Service). The Service, *inter alia*, adopts standards and recommendations as to the conduct of financial monitoring and updates the list of persons connected with terrorist activities and subject to international sanctions.

The Criminal Code imposes criminal liability for laundering the proceeds of a crime. The sanction is imprisonment of up to 15 years combined with confiscation of the proceeds of the crime and property of the convicted person as well as deprivation of the right to perform certain activities or hold certain positions for up to three years.

In 2015, Ukraine introduced the Law On Prevention of Corruption, which provides a new electronic system of submission of declarations of politically exposed persons and persons authorised to perform the functions of a state or local government (the Person) and provides for a comprehensive list of information that must be reflected in the declaration.

The following shall be reflected in the Person's declaration:

- a* real estate, including real estate under construction, owned by the Person and his or her family members, including joint ownership, lease or other right of possession;
- b* moveable assets owned by the Person and his or her family members the value of which exceeds 160,000 hryvnia;
- c* securities, including shares, bonds, cheques, certificates, promissory notes, including those controlled by another person (indicating the share in the company) and other corporate rights, owned by the Person and his or her family members;
- d* intangible fixed assets owned by the Person and his or her family members, including intellectual property rights that can be monetarised;
- e* accrued revenues, including revenues from salaries, remunerations, dividends, gifts, etc.;
- f* cash assets exceeding 80,000 hryvnia, including cash, assets placed in bank accounts, deposits at credit unions and other non-bank financial institutions; and
- g* all financial liabilities of the Person exceeding 80,000 hryvnia (including loans, liabilities under lease contracts, amount of cash paid in respect of the principal amount of the loan and interest thereto, liabilities under insurance contracts and assets borrowed to other persons, etc.).

V CONCLUSIONS & OUTLOOK

Ukrainian legislation is going through a period of reform with the aim of becoming compliant with international and EU standards. Substantial changes are already visible though the climate for private wealth management and protection in Ukraine is still not friendly enough for the owners of Ukrainian businesses.

There is a growing need to introduce wealth protection structures at the ownership level. Currently, the first generation of Ukrainian businessmen is actively looking into the restructuring of their businesses in order to secure the interests of their families for years to come.

A reliable and effective solution to achieve these goals remains the creation of a cross-border structure with a trust or a foundation at the top. Such structuring provides for a transparent and reliable ownership and control system for the business, and helps to protect the interests of the beneficiaries. Since Ukrainian legislation now emphasises transparency as a major requirement for all such structures, it is important to consider that the UBOs of such structures may be disclosed to Ukrainian authorities and that such information will be publicly available.

In recent years, the Ukrainian tax system has not been stable. Ukraine has joined the BEPS project and developed a list of draft tax laws, but these initiatives have not been adopted yet. Meanwhile, taxpayers can enjoy a wide network of Ukrainian double taxation treaties and the opportunities they create.

Ukrainian law covers the main aspects of succession and matrimonial relations and provides for the possibility to enter into agreements in order to structure such relations and define specific regulation for specific cases. No updates or amendments thereto have been announced by Ukrainian government at this stage.

The AML Law and the Criminal Code serve as the main sources of the Ukrainian anti-money laundering regime. In particular, the AML Law provides for a range of financial monitoring procedures.

Ukraine has taken significant steps towards the creation of a disclosure and transparency regime, in particular, introducing the electronic declaration of assets by PEPs. Finally, Ukraine is developing its first deoffshorisation regulations, which, however, are yet to be adopted.

To sum it up, Ukraine is currently experiencing significant transformations under the banners of transparency and liberalisation. Though there is a long way to go, the course towards the highest European and international standards is clear and positive changes are expected to come in due course.

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Alina Plyushch is a counsel with Sayenko Kharenko specialising in corporate law, M&A, corporate finance, capital markets and private wealth management.

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