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Germany

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HEAT MAP

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Inducements (independent advisers and portfolio managers)			
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Best execution			
Product governance and distribution			
Investment advice			
Product intervention			
Recording communications			
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Information to clients			
Dealings with eligible counterparties			

Key:



Significant change



Moderate change



Minor / no change

Level 1 (Final)

Client categorisation

- No change to client categories or criteria for elective professional clients/eligible counterparties
- Discreet change to treatment of municipalities and local public authorities (by default, retail clients with ability to become elective professional clients)
- Member States have discretion in designing the opting up procedures for municipalities / local public authorities)

Conflicts of interest

- No change to existing regime
- Amalgamation of Levels 1 and 2 of MiFID I
- Express statement that conflicts arise from inducements and remuneration structures

Client order handling

- Requirement to disclose unexecuted client limit orders to the public extended to capture additional trading venues created by MiFID II
- ESMA was not asked to provide technical advice

Complaints handling

- No significant change to MiFID I
- Member States to notify ESMA of their out-of-court complaints and redress procedures - ESMA intends to keep a list on its website

Clear, fair and not misleading communications

- No direct change to current regime
- Extension of fair, clear and not misleading regime to eligible counterparties

Client assets

- No significant change to MiFID I

Inducements (generally)

- Existing test for receiving third party payments remains – (i) enhance quality of service, (ii) be in clients' best interest; (iii) be disclosed
- 'Minor non-monetary benefits' excluded from ban for independent advisers and portfolio managers
- Confirmation of disclosure requirements to clients – must be accurate (and periodic)
- Summary disclosure no longer possible

Inducements (independent advisers and portfolio managers)

- New EU wide ban on payments being received and kept (or off-set against fees owed to firms)
- Applies to retail and professional clients
- 'Minor non-monetary benefits' excluded from ban
- Member States can gold-plate

Suitability

- Requirement to assess suitability of product when advising retail/professional clients remains
- If advising on bundled/package product, overall product needs to be suitable
- New requirement for a suitability report for retail clients

Appropriateness/execution-only

- Appropriateness test remains the same
- List of 'non-complex' financial instruments on which appropriateness can be undertaken is narrowed
- Explicit statement of what is a 'complex' product (including structured UCITS)
- Appropriateness test always required where 'credit' provided

Level 1 (Final)

Best execution

- Firms must publish top 5 execution venues actually used each year, and to notify execution venue used for each trade; new publication duties for execution venues
- Must take "all sufficient" steps for best execution
- Firms that RTO/place to have execution policies
- Policies to be tailored and detailed and material changes notified
- Demonstrate best execution to regulators on request

Investment advice

- No change to definition of investment advice
- New concept of 'independent' and 'non-independent' advice
- Parameters set that need to meet to give 'independent' advice
- New information and reporting duties

Record-keeping

- No significant change to MiFID I
- Clarification that records are also required to allow regulators to fulfil their supervisory duties under other EU regulations and to demonstrate firms' compliance with rules related to 'market integrity'
- Gold-plating expressly permitted

Reporting to clients

- Existing reporting requirements remain
- Extended to require 'periodic' reporting
- Specifics for investment advice or when using distance communication
- Extends reporting requirement to also apply to eligible counterparties

Information to clients

- Existing requirements remain and enhanced for :
 - investment advice (with new 'independent' advice)
 - financial instruments (to implement product governance requirements)
 - costs and charges (aggregated and individual costs, provided 'in good time' and annually updated)
- Additional requirements for bundled products

Remuneration

- New requirements for investment firms
- Restrictions on incentive schemes, internal rewards and sales targets for staff
- New remuneration policy and procedure approved and overseen by senior management
- Focus on responsible business conduct, fair treatment of clients, avoiding conflicts of interest, clients' best interests

Recording communications / taping

- Was optional, but now mandatory for certain firms to record calls and electronic communications that (could) result in a transaction
- Also affects privately owned devices used for encompassed communication
- Records to be kept for 5 / 7 years
- File note of face-to-face meetings with clients to be kept

Dealings with eligible counterparties

- Exclusion from MiFID requirements for "eligible counterparty business" remains
- Recitals extend some investor protection requirements to ECPs as they are 'clients'
- Obligation to act honestly, fairly and professionally
- Obligation to communicate in a manner which is fair, clear and not misleading
- To receive certain information / reports

Product intervention

- Completely new regime for national regulators to ban products and services
- Completely new regime for ESMA / EBA (under MiFIR) and EIOPA (under PRIIPs) to temporarily ban products and services on an EU wide basis or in specific Member States

Product governance and distribution

- New EU wide product governance and distribution regime
- Detailed obligations apply to product manufacturers and, separately, distributors

Level 2 (Final Technical Advice)

Client categorisation

- ESMA was not asked to comment on treatment of municipalities and local public authorities or their opting up procedure
- Firms which are eligible to become elective ECPs narrowed (elective professionals excluded)
- New procedure for opting up to ECP status – warnings need to be given, specific procedure adopted, written confirmation required

Conflicts of interest

- Disclosure can only be used as a 'last resort'
- Over-reliance on disclosure implies a firm's conflict of interest policy is deficient
- Disclosures must be tailored, and contain a warning
- Conflicts policies must be reviewed at least annually
- Operational separation of staff producing 'recommendations'.
- Physical separation of staff preparing investment research (unless this is disproportionate)
- Significant emphasis on underwriting and placement

Client order handling

- ESMA was not asked to provide technical advice

Complaints handling

- Written complaints handling policy / procedures required and new complaints oversight function (can be provided by compliance)
- Applies to retail / professional / potential clients
- Complaints to be brought free of charge
- No clarity on what amounts to a 'complaint' in the context of professional clients
- Complaints data to be reported to regulators
- Level 3 guidelines may be made

Clear, fair and not misleading communications

- Targeted improvements to communications with retail clients (i.e. consistent language, indication of risks, kept up-to-date, performance scenarios)
- To improve treatment of non-retail clients, extending some 'retail-like' obligations to professional clients
- Confirmed technical advice does not apply to communications to eligible counterparties

Client assets

- New officer responsible for client assets
- Further restrictions on title transfer collateral arrangements and must demonstrate 'appropriateness' and disclose the risks of TTCAs; restrictions also for professional clients
- New requirements for securities financing transactions; diversify where client funds held; limits on intra-group deposits; ban on custody liens / not segregating if not prescribed by applicable law

Inducements (generally)

- Non-exhaustive list of when 'quality enhancement' test not met - firms must prove quality enhanced
- Inducements to be disclosed, individually priced
- Dealing commission paying for research banned
- Level 3 guidelines expected to supplement what does not enhance the quality of a service

Inducements (independent advisers and portfolio managers)

- Any third party payments received must be paid over 'as soon as reasonably practicable'
- Can pay over by paying into client money account
- Exhaustive list of 'minor non-monetary benefit' - narrowly interpreted and strictly applied
- Must have policy for ensuring amounts paid over
- Can inform clients of amounts paid over in regular statements

Suitability

- Prescribed content of suitability reports and periodic reports
- Clients to be alerted where suitability may need to be reviewed periodically – no need to revisit the entire assessment, just what has changed
- Suitability assessment required for simplified advice (e.g. advice given through automated processes)
- Additional duties for assessment of suitability (e.g. when switching investments or whether other – less complex and lower cost – financial instrument)

Appropriateness/execution-only

- Products expressly excluded from the 'non-complex' product definition are automatically complex and cannot then go through the separate test to see if they fall within being a non-complex product
- AIF are always complex
- For the separate 'non-complex' test, a further two criteria have been added
- New record-keeping requirements
- ESMA guidelines expected on the warning for clients where there is a "not appropriate" assessment

Level 2 (Final Technical Advice)

Best execution

- Tailored best execution policies
- Separate policy summaries for retail clients
- No clarity on how to satisfy 'all sufficient steps'
- Execution venues/entities to be notified (but not necessarily need to be listed in policies)
- Additional disclosure requirements
- Clarity on what constitutes a 'material change' to trigger a review of the policy
- Separately, draft RTS under discussion by ESMA

Investment advice

- Change to definition of investment advice - exclusion for where advice given through 'distribution channels' deleted
- Additional requirements in order to meet threshold for giving 'independent' advice
- Level 3 guidelines anticipated on what amounts to investment advice and to clarify how to meet 'independent' standards
- Specification of new information and reporting duties

Record-keeping

- ESMA codifying Level 3 guidance from 2007
- Non-exhaustive list of type of records to be kept in writing (regardless of technology used)
- Extended to apply to a wider range of firms and situations
- Content of records prescribed
- Does not apply retrospectively
- RTS being developed and Level 3 guidelines expected

Reporting to clients

- Confirms reporting requirements for all clients (but ECPs can agree different standards for content and timing)
- Professional clients to receive same reports as retail clients
- Depreciation thresholds which trigger reporting requirements (multiples of 10%)
- Some reports disappplied if information is available on a website which is a 'durable medium'

Information to clients

Increased information requirements for:

- Investment advice: applies to professional clients
- Costs and charges: significant level of detail, also for professional clients
- Client agreements expanded
- ECPs can opt out from receiving information (but not where they on-sell to retail clients)
- Professionals can also opt-out in certain circumstances

Remuneration

- ESMA is codifying its previous Level 3 guidance
- Includes in-kind benefits and career progression
- Compliance function and senior management to set remuneration policy
- Balance between fixed and variable remuneration
- Requirements extended to relevant people who affect a firm's services and its 'corporate behaviour'
- Also, ESMA consultation on Guidelines on sound remuneration policies under CRD IV (4 March 2015)

Recording communications / taping

- New policy required with senior management oversight and (proportionate) ongoing monitoring
- Record-keeping obligations
- Content of face-to-face file note prescribed
- To be stored in durable medium
- Must inform clients that calls being recorded and kept for a minimum of 5 years

Dealings with eligible counterparties

- ECPs can opt out from receiving some reports/information but not where they are on-selling products to their own clients or where the product embeds a derivative
- Firms can also agree with ECPs different standards for the content and timing of reports

Product intervention

- EBA has separately consulted on its product intervention powers for structured deposits; EIOPA is consulting on the same for PRIIPs
- Criteria for national regulators tweaked
- Criteria is non-exhaustive for national regulators but ESMA advises Commission to consider if it should be exhaustive for EBA/ESMA (and presumably EIOPA)

Product governance and distribution

- Applies to 'services' as well as 'products', for all client types and to all distributors in the sales chain
- Also consider 'market threat' in developing products
- Only one target market assessment required, for pure manufacturers this is on a 'theoretical basis'
- Non-MiFID entities' products not exempt from regime
- ESMA proposes to eventually harmonise product governance regimes across MiFID / UCITS / AIFMD

Impact in Germany

Client categorisation

- Current German legislation and administrative practice largely in line with new provisions of MiFID II

Conflicts of interest

- Reassess the firm's conflicts, update policies and procedures, and implement periodic (at least annual) review
- Create suite of disclosure documents, tailored for different client types/services/strategies, with the new warning and more detail than before
- Consider how to demonstrate that disclosure is being used only as a last resort
- Physical separation of analysts, and additional operational separation required?
- Impact on placement / underwriting business

Client order handling

- Impact in relation to handling client orders on new trading venues

Complaints handling

- Extend existing retail complaints-handling regime to professional clients
- Change operational procedures and information duties
- May need to increase staff to deal with more complaints
- Enhanced responsibility of management
- Regulatory fees likely to increase

Clear, fair and not misleading communications

- Communication with all clients to reflect changes
- Extension of some obligations to professional clients entails review of information used exclusively for non-retail clients
- Dealing with ECPs in fair, clear and not misleading manner is unlikely to be much of a change

Client assets

- Firms will need to reassess TTCA arrangements, in particular with professional clients; negotiate new threshold limits for portfolio management clients; renegotiate sub-custody arrangements so that third parties cannot disapply segregation requirements/require liens where they are not required by applicable law
- Impact on General Terms and Conditions for securities transactions and banking business?

Inducements (generally)

- Criteria for quality-enhancement-test still unclear but more restrictive
- End to 'free' research and strict requirements on commission sharing arrangements
- New and tailored disclosure requirements

Inducements (independent advisers and portfolio managers)

- German regime largely equivalent for independent advisers
- For portfolio managers, huge impact with all third party payments banned

Suitability

- Suitability test to become more complicated (additional duties for assessment of suitability)
- Suitability report largely anticipated by Beratungsprotokoll

Appropriateness/execution-only

- Reassess product suite against narrowed definition of 'non-complex', in particular for fund products
- For products that are now complex, these products cannot be offered on an execution-only basis
- Operational changes needed to accommodate new recordkeeping requirements
- Little real clarity on complex/non-complex product distinction

Impact in Germany

Best execution

- Reconsider entire best execution process, in particular in case of firms that RTO/place
- Redraft policies / create retail summaries
- Evidence best execution, "all sufficient steps"
- Publish top 5 venues
- Publish required information in standardised form but with sufficient granularity

Investment advice

- As "Honorar-Anlageberatung" (comparable to independent investment advice) has already been introduced into German legislation, little changes in this respect
- Existing templates and forms for client information will need review, also with regard to scope of financial instruments taken into consideration for advice

Record-keeping

- Extension of existing record-keeping obligations as stipulated by MIFID II and Level 2-measures

Reporting to clients

- Professional clients to receive what retail clients receive
- Negotiate with ECPs what reports they receive and record what is agreed
- More reporting due to additional triggers for reporting / shorter intervals
- May need to update terms of business
- If reporting online, need to ensure website is a 'durable medium'

Information to clients

- Review of existing information; New information duties relating to costs particularly challenging
- Relationship between KID for PRIIPs, other Germany specific or EU-specific investor information documents and MiFID II-requirements
- Negotiate with ECPs and professionals what information they do not wish to receive
- Significant amount of information going to clients

Remuneration

- May need to revisit who is caught by the new rules after there is clarity on who affects a firm's 'corporate behaviour
- Slightly stricter requirements on variable remuneration

Recording communications / taping

- New policies and definitions of communication to be recorded
- Challenges in case of Bring-Your-Own Device practice
- New technical infrastructure for recording and storage of records
- Implementation should be started as soon as possible

Dealings with eligible counterparties

- German regime already super equivalent in some respects
- Information and reporting to ECPs is a more significant change

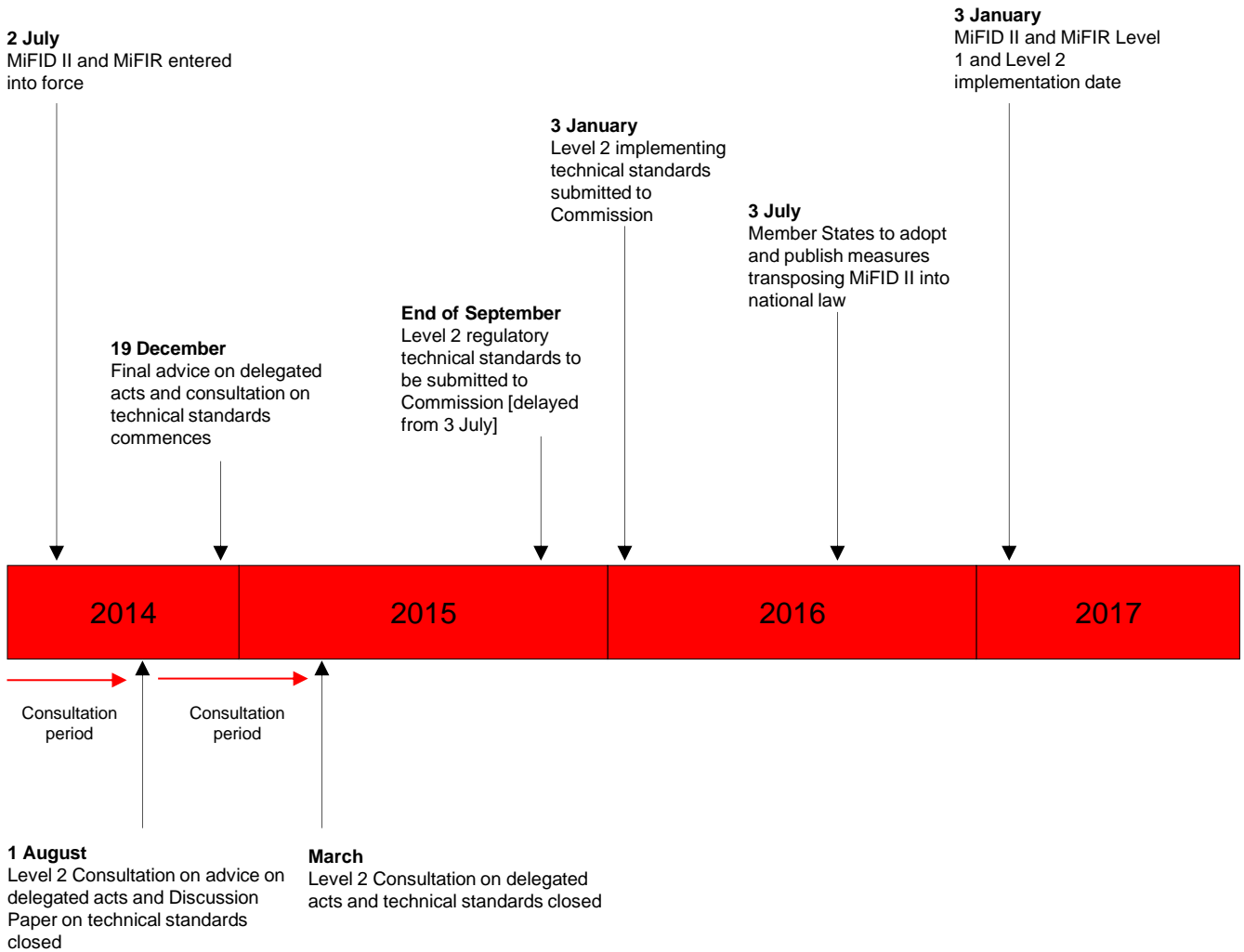
Product intervention

- German "Kleinanlegerschutz-Gesetz" intends to implement these MiFID II provisions prior to entry into effect of MiFID II
- New explicit powers for supervisory authority

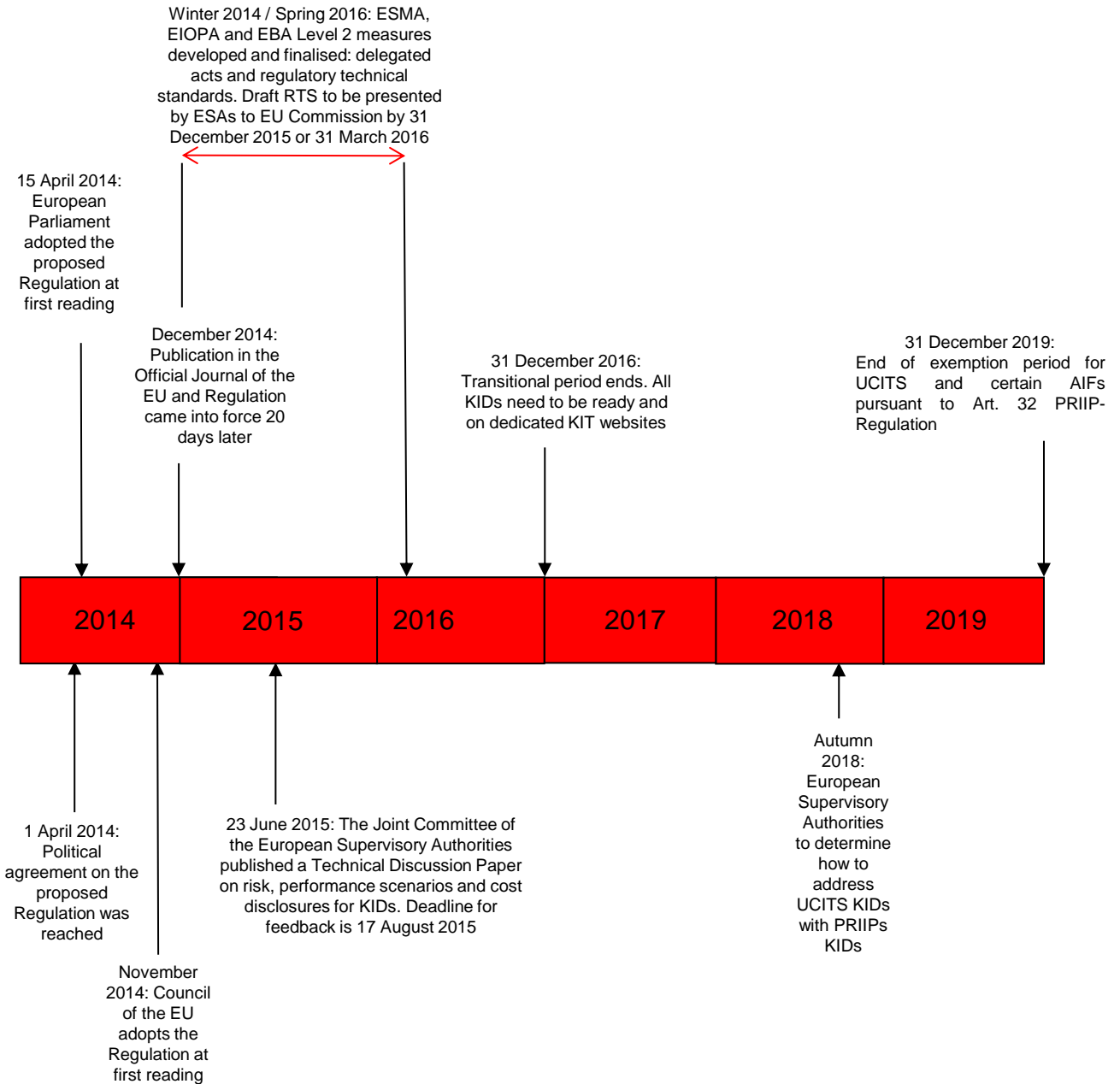
Product governance and distribution

- German „Kleinanlegerschutz-Gesetz“ will implement MiFID II – Product governance separately; Act has already been adopted
- Despite New-Product Approval Process pursuant to MaRisk significant organisational challenges possible
- Changes to distribution strategies and distribution agreements necessary?
- Ultimately also of relevance to existing products

Timing: MiFID II and MiFIR



Timing: PRIIPs*



* Regulation on Key Information Document (KID) for packaged retail and insurance based investment products (PRIIPs)

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