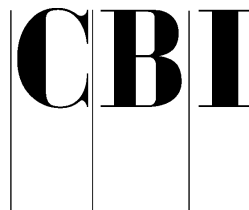


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Director General
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CBI RESPONSE TO
HOME OFFICE CONSULTATION DOCUMENT
'REFORMING THE LAW ON INVOLUNTARY MANSLAUGHTER:
THE GOVERNMENT'S PROPOSALS'

1. The Confederation of British Industry (CBI) represents 250,000 businesses, embracing all sectors from manufacturing and services, including the utilities and retail. Its membership ranges from large multinational organisations with many subsidiaries, to small and medium enterprises with fewer than 200 people. All businesses may be affected by the Government's proposals on reforming the law on involuntary manslaughter particularly as it relates to corporate killing
2. The CBI welcomes the opportunity to respond to the Home Office consultation document **'Reforming the Law on Involuntary Manslaughter: The Government's Proposals'**.
3. These proposals cannot be taken in isolation and make no reference to developments in human rights legislation and initiatives taking place in other Government departments such as the DTI (Company Law and Corporate Governance) and DETR/HSE (Revitalising Health and Safety). The CBI has concerns that the aggregate effect of the way all these proposals are taken forward and interpreted could treat businesses unfairly in comparison to the obligations on other organisations or sections of society.
4. Whilst there are no grounds for complacency, the UK is one of the best performers in health and safety terms within Europe. This record has been achieved by diligent application of risk-based law aimed at preventing incidents and has been secured without the practice of imprisonment of managers and directors.

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INVESTOR IN PEOPLE

5. The CBI's submission provides general comments on the current developments of the criminal law, as well as providing more specific comments on the possible implications of the proposals on businesses and directors. It addresses the relevant questions posed in the consultation document and comments on some of the legal drafting.
6. The CBI is particularly concerned that the Draft Bill does not faithfully reflect the discussion in the Consultation Document and we look forward to being consulted further on the wording of this and changes to other workplace health and safety legislation.

SUMMARY

The general law of manslaughter is in need of reform, the public deserve reassurance that business is accountable and takes its responsibilities to society seriously. However, the framework of obligations within which business must work needs to provide clear standards for behaviour and should not subject business to different standards of proof in relation to criminal penalties than those which apply to other sections of society. The detail of the proposed offence of corporate killing is not the right route to reform.

We believe that the best results will be achieved by ensuring compliance with the current law. We consider that adequate resources must be available for the enforcing authorities and that stakeholders involved in high standards of workplace health and safety performance are motivated and supported to understand and contribute to furthering best practice.

However, if the proposal is taken forward we consider that the tests for an offence of corporate killing should be fair on business and those proposed are not. We would wish to be consulted further as to the appropriate legal tests

In the event that an offence of corporate killing is brought in it should be

- Applied to all undertakings; Crown Immunity should be limited to matters of national security**
- Related to a duty holder's obligations for the reasonably foreseeable identification and evaluation of risks and the reasonably practicable control of risks.**
- Applied to behaviour that wilfully or recklessly disregards foreseeable risks to employees and the general public**
- Enforced by an appropriate regulatory authority, avoiding duplication and after consultation with the Crown Prosecution Service (CPS).**

It is proposed to introduce individual offences of reckless killing and killing by gross carelessness. We believe that there is a case for the introduction of an offence of reckless killing in relation to work related fatalities which could be used in the most serious cases but its use would be rare. This coupled with the current duties on individuals and appropriate penalties under the Health and Safety at Work etc Act 1974 (HSWA) are the best ways forward. There should be further consultation on the penalties for the offences for individuals and undertakings under HSWA

It is unnecessary to introduce further additional individual offences linked to making a substantial contribution to Corporate Killing. The offences for individuals per se are adequate

GENERAL COMMENTS

BETTER ENFORCEMENT OF CURRENT LAW

7. The debate on corporate manslaughter takes place against increasing public concern that the sanctions imposed by the courts do not reflect the consequences of the event, both for individuals and for corporations. Particularly for fatal injuries, there is the view that someone must be and must be seen to be to blame. However, the failure of the authorities to be able to secure prosecutions against corporations in recent high profile cases should be reconsidered to determine whether it was due to the inability to obtain the evidence to support the allegations, rather than that the legal tests were inappropriate. In seeking to change the evidentiary burden and make prosecutions easier, the proposal that the test that the conduct of a company 'falls far below what can reasonably be expected from the corporation in the circumstances' is far too imprecise as a basis for criminal liability. Further a conviction may follow where the management failure is merely 'a' cause of death. There is no requirement for it to be a significant or major cause.
8. The real challenge under new proposals, as it is with current law, is getting the evidence, proving and enforcing the law whatever the offence is called.

CHANGING VALUES

9. Business recognises the changing values and expectations of society and accepts the balance of authority and responsibility that should be placed on organisations and individuals, both within and outside an organisational framework. However, business operates by managing risks and should be held accountable when risks are not managed appropriately. They cannot be expected to provide or be accountable for a risk-free environment.

BUSINESS COMPETITIVENESS

10. It is also important that the developments in framing legislation and penalties for business are not misunderstood by those considering inward investment and having the flexibility to choose global locations. With the development of 'e-commerce' all the consequences, both intended and unintended, and desirable and undesirable, should be explored before any change in the law is introduced.

APPLICATION AND ENFORCEMENT

11. The proposals in the document are unclear in relation to the effects of devolution in the UK and these should be more adequately explored and explained. In particular, it refers to disqualification of ‘culpable officers’ from acting in any management role in any undertaking carrying on a business or activity in Great Britain but the proposals on corporate killing and enforcement only refer to England and Wales. The proposals must recognise the reality of enforcing sanctions on companies, officers or individuals outside the UK.

PENALTIES AS MOTIVATORS

12. The CBI stresses that companies must not gain advantage from flouting health and safety law. Compliance with the law and a high standard of health and safety performance are seen as primary indicators of business success as well as being necessary to gain the public approval to operate. However, generally, prosecutions and penalties are not the prime motivators for a company to internalise good health and safety systems and performance.

13. Health and safety law, penalties and enforcement should be primarily aimed at

- promoting control of risks to prevent injuries and illhealth
- encouraging investigation of incidents to prevent a recurrence
- providing a proper deterrent to those who flout the law.
- punishing those responsible for failures

14. The proposals address primarily the last point and make little direct contribution to the others which are dealt with in the Health and Safety at Work etc. Act 1974 (HSWA). The CBI accepts that effective penalties for companies and individual directors who fail to meet their legal duties are a key requirement for effective health and safety enforcement. The CBI would support measures to strengthen enforcement as long as they are reasonable and proportionate. Proposals to allow courts to make remedial orders are in line with that possible under HSWA but the court should be have regard to the totality of expenditure required when imposing fines in addition to other sanctions. All penalties and sanctions should be subject to a right of appeal.

INDIVIDUALS IN COMPANIES

15. The CBI agrees that the general law of manslaughter is in need of reform. As far as fatalities arising from work activities are concerned it is already

established under HSWA legislation that there is a place for imposition of prison sentences for individuals held responsible for the most serious omissions or acts. This would be comparable to the proposed tests for the offence of Reckless Killing. Whilst the cases in which it would be relevant must be extremely rare, the law should provide for the worst circumstances.

16. In respect of offences against an individual, the removal of a person's liberty, or ability to make a livelihood must always be taken as a serious issue deserving the most careful consideration and the law must be crafted to ensure that the correct person is able to be held accountable. The current structure of HSWA, differentiating duties for employees, managers directors etc provides for this.
17. The CBI however considers that there is no need in work-related fatalities for a link to be made with the offence of killing by gross negligence. This duplicates the obligations, already developing legal definition, under HSWA Sections 7 (duty on employees); 36 (duty on other persons) and 37 (duty on directors, managers, secretaries). The legal tests of failure to take reasonable care and consent, connivance or neglect are not high and are similar to those proposed for gross negligence. Individuals culpable of such failures leading to work-related fatal accidents should properly be dealt with under health and safety legislation.
18. The CBI considers that a separate consultation about amending the penalties (to include the possibility of imprisonment) for offences under these sections should be held. However, we doubt that such a move would lead to a real improvement in health and safety performance and is more likely to lead to 'scapegoats'. The linkages between this proposal and HSE proposals for revitalising health and safety and the disqualification of culpable officers have not been adequately explored. The proposals could deter the involvement of the most able and diligent people in business to the detriment of the whole UK business base.
19. Within organisations, employees must take reasonable care for their own health and safety and that of others to contribute to the organisations efforts. If the law focuses the responsibility on an individual, however senior, it runs the risk of others abdicating their responsibility to the detriment of the team effort. Health and safety management has suffered too long from this attitude where someone else must be to blame. This should in particular be compared with financial performance where the corporate culture and management systems encourage individuals to understand the contribution they make to the effort of the whole.

DISINCENTIVE TO BUSINESS INNOVATION

20. Limited companies were set up by society to do tasks that could not have been done by individuals or families. They were encouraged to take some business risks to achieve great objectives. The opportunities encouraged for such enterprise must be recognised in respect of their liabilities. It is entirely appropriate to punish organisations that disregard foreseeable risks but the law should not induce risk averse behaviour in those whose proper concern is the rational assessment of business and operating risk.

THE PROPOSED OFFENCE OF CORPORATE KILLING - IS A NEW OFFENCE NECESSARY

21. The CBI does not consider there is a need for the introduction of an offence of corporate killing but if such an offence is developed we have serious concerns about the construction that is proposed. The Law Commission considers that it is wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee and could not have been foreseeable by a reasonable person observing his conduct. The test for companies should not be dissimilar.

22. The construction proposed adds considerable uncertainty and unfairness to business operations. It is proposed that the conduct attracting the offence is that falling **far below** what could be reasonably expected. Business appreciates that this is open to interpretation, development and the expectations of society but it seriously lacks definition. However business considers it unjust that the risk does (a) not need to be obvious to the organisation and (b) the organisation does not have to be capable of appreciating the risk. Business considers it proper that they have an obligation to ensure the health and safety of employees and others so far as is reasonably practicable and for reasonably foreseeable risks. This is consistent with the Management of Health and Safety at Work Regulations 1999 and the 'Turnbull' Code – Internal Control: Guidance for Directors on the Combined Code

23. The law on managing and controlling risks should be based on a balance of the costs and benefits to all parties and government must decide where this balance lies. Businesses are expected to carefully evaluate risk and not to take inappropriate risks. Business must have recourse to having an appropriate defence of performing to a standard of "due diligence" or "reasonable care".

24. The concept of "management failure" is likely to give rise to dispute and uncertainty. The Draft Bill carries the implication that there must have been a management failure if there has been a death whereas the proposal makes this a matter to be ascertained. The question of the degree of management failure is of crucial importance. Clarification is imperative of the statement that a management failure "will be regarded as a cause of a person's death even if the immediate cause is the act or omission of an individual. At face value this represents an unwarranted disregard for the principle of causation.
25. The CBI supports strong enforcement of the current law, which already provides an adequate legal framework under the Health and Safety at Work Etc Act 1974 as the Courts already have the power to impose unlimited fines on employers and imprison directors for some health and safety offences tried in Crown court. This law is aimed at the work situation in its entirety and is consistent with the business objectives of evaluating and controlling risks.
26. The CBI does not think that a new law of corporate killing will, in itself, as proposed, add much to the powers that the courts currently have. The main purpose of such a measure would be to add a greater stigma to 'name and shame' companies and to make justice "visible" to the public in a very limited number of very serious cases. Creating a legal category of corporate killing could be seen as renaming an offence that already exists in current law as it gives courts no more power than they currently have under current HSWA. There is a danger that the proposals will lead to duplication in the law dealing with work-related fatalities unless a coherent approach is taken by Government. It will also have the undesirable effect of making health and safety legislation look less important thereby creating challenges for both enforcers and duty holders. Employers understand the importance of the Health and Safety at Work etc Act 1974 and would wish to see the Government giving it the priority it deserves.
27. Although we note what the Government says in the consultation paper regarding alternative verdicts and their use within the criminal justice system, we consider it would be inequitable for convictions under Section 2 or 3 of the Health and Safety at Work Act 1974 to be returned where a company is acquitted of the charge of corporate killing. Companies, like individuals, are entitled to know the case against them before they go to court. The proposed offence of corporate killing is different in nature to a charge under Section 2 or 3 of HSWA. They are not "alternative" charges, as there are different legal questions to address. More importantly we do not regard Section 2 or 3 as being "lesser" as they carry the same penalty as is proposed for corporate killing.

28. Given the limited resources in both business and the enforcing authorities the CBI questions whether, as a result of introducing the offence of corporate killing, it is more likely that the law will be enforced more fully and whether it is more likely that duty holders will comply with their statutory health and safety duties more fully, more consistently and for more of the time.

29. The CBI believes that the best results will be achieved by ensuring that adequate resources are available for the enforcing authorities and that stakeholders involved in high standards of workplace health and safety performance are motivated and supported to understand and contribute to best practice.

CBI COMMENTS ON THE SPECIFIC QUESTIONS IN THE TEXT

The Government invites views on whether there should be an additional involuntary homicide offence covering those situations where a minor injury is all that was intended but death, which was unforeseeable, occurs.

30. The CBI has views on the offences by individuals only in so far as they have an impact on business. While this proposal relates to individuals it is so fundamentally at odds with an understanding of risk and an acceptance of proper prior evaluation by the public, that its introduction would be an unacceptable precedent.

31. One of the reasons for the demands of the public after an incident is that the public perception of risk is different from that of policy makers. The introduction of an offence that clearly has no basis in understanding and controlling risk will perpetuate and accentuate this situation. The way the argument is stated in the Consultation Document distorts the principles of risk and foreseeability and undermines the debate that was stimulated in the HSE Discussion Document 'Reducing Risks Protecting People'.

32. If a course of action is intended to cause some injury then it is a moot point as to whether death is foreseeable. The outcome of a deliberate violent act may have been minor – a cut if the assailant misses or a death if the assailant hits and the recipient falls and hits his head on a hard surface. The risk of serious injury and death in such circumstances is both high and foreseeable. The argument about haemophilia is a red herring. The law should require individuals to understand the likely consequences of their intentions and actions. Law that is sensitive only to outcomes is generally sensitive only to chance and hindsight and does not encourage anticipation and an attitude of accepting responsibility for one's actions.

Are the proposed maximum penalties appropriate? In particular, is the proposed maximum penalty of 10 years for killing by gross carelessness appropriate? Should the maximum sentence where death results but the offender was reckless to or intended only minor injury be between 5 and 10 years.

33. We consider that the proposed maximum penalties should be consistent with and proportionate to the penalties for other comparable offences and should be reviewed as a package.

The Government would welcome comments on whether the application of the offence to "undertakings" is preferable to applying it solely to corporations.

34. The CBI believes that if there were to be an offence of corporate killing then it is essential that it applies to all undertakings and not just those that are corporations. The support, finance and structure of organisations is now so diverse that their status is driven by factors other than the ability to create wealth, by way of trade or for purpose of gain. Whether a body's intention is to be profit making or not is usually an accounting and tax definition with no linkage to its potential for and control of risks. Voluntary organisations and businesses are doing work previously done by the public sector and are doing it, often, in direct competition with the public sector.
35. All undertakings including government bodies, health trusts, government agencies have the potential, during the course of their operations, to expose their employees and others to risks that may result in death and they should be treated similarly in the event that there is a death arising from a management failure. Those that make a profit and are funded by private money should not be treated any differently from those that chose to have a non-profit-making status and those that are funded by money from the public purse.
36. The concept of an undertaking is developed, though not defined, in HSWA. Under this legislation there are various duty holders who may be prosecuted if they fail to perform their duties in respect of the undertaking. It is essential that if the proposals are applied to all undertakings then the appropriate obligations must be placed on the appropriate duty holder or legal entity. Better legal definition is essential to ensure the most direct and transparent legal basis for responsibility.

The Government would welcome any comments on the application of Crown immunity to the offence of corporate killing.

37. The CBI considers that there should be no justification for Crown immunity other than for reasons of national security. Many organisations previously considered to be subject to Crown immunity are no longer under the direct control of Ministers of the Crown but have agency status and some are in direct competition with private businesses. The organisations and why they have Crown immunity is not transparent, it is obscured by 'John Doe' cases and Memoranda of Understanding between Government Departments and Agencies that are not in the public domain. For an informed debate that could

justify any retention of Crown immunity this information should be in the public domain.

38. The proposal in this consultation to exempt the Crown from prosecution for an offence of corporate killing is in sharp contrast with the DETR's declared intention to remove Crown immunity in all cases of alleged breaches of health and safety statutory duty.

The Government therefore considers that there is a good case in England and Wales for the health and safety enforcing authorities and possibly other enforcement agencies, as appropriate, to investigate and prosecute the new offences, in addition to the police and CPS. We would welcome any comments on this.

39. The CBI considers that it is preferable to have one enforcing authority for investigation and prosecution of work-related fatalities. We consider that this should be the relevant regulatory authority as they have the experience of enforcing and advising on management systems and arrangements that deliver acceptable health and safety performance. Further discussion will be necessary on this point depending on the scope of the proposed offence. It will, of course, be necessary to gather evidence to determine what offences have allegedly been committed and this may involve the interests of several enforcing authorities who should liaise in the collection of evidence so that the organisation under scrutiny does not need to duplicate and waste effort to assist in the provision of information.

40. While one aim of an investigation is to seek evidence to punish those who have failed in their duties another, another equally important aspect is to share learning points with other organisations and make recommendations to prevent a recurrence. Information about improvements to management systems must not conflict and must be conveyed in a way that allows organisations to act on them. The circumstances must be analysed by enforcers who understand such management arrangements.

41. We consider that there should be a requirement for consent for the institution of private prosecutions for the offence of corporate killing. While a right to private prosecution exists under the Prosecution of Offences Act 1985, it may be subject to appropriate controls. The CBI would urge that controls be introduced to prevent private prosecutions being brought for improper motives, otherwise, companies (and individuals) may be subject to a substantial amount of publicity in highly charged situations that may lead to irreparable financial and personal harm. It is unrealistic to expect that private

individuals will be in a position to make an informed assessment of the relevant corporate management practices which, as a matter of fairness and practicality, must precede the launch of criminal proceedings. As such proceedings may not be warranted and could perhaps be funded by the tax payer through the legal aid scheme, it is in the public interest for the consent of the Director of Prosecutions to be obtained prior to the bringing of private prosecutions for corporate killing.

42. We also believe that it is preferable that one organisation should be able to institute proceedings. The HSE should continue to do so for offences under HSWA. However, in the event that there is an offence of corporate killing it is likely that the CPS would have to be involved to advise the HSE as they have the knowledge of the more general criminal law. The point in relation to duplication and waste of enforcement authority and business resources should however be taken into account and it should be clear to all parties the extent of their roles and arrangements for coordination.

The Government therefore proposes that the prosecuting authority should also be able to take action against parent or other group companies if it can be shown that their own management failures were a cause of the death concerned.

43. The draft Bill in its present form is clearly capable of grounding convictions for corporate killing against parent or other group companies if those companies are actively involved in the management of the relevant company and if the deficient management is, in fact, a cause of death and the companies' conduct in that regard falls far below what can reasonably be expected of them in the circumstances. This highlights the uncertainty surrounding the interpretation of 'management failure'. The CBI considers that it would not be appropriate for parent or other group companies to face liability unless there is a direct causal link between the company entity and the failure that led to the fatality and they can be shown to be culpable. It is inappropriate to use this debate to introduce a significant change to English company law for parent or other group companies to have new responsibilities to supervise or manage related companies. This could seriously threaten to undermine the way in which companies organise themselves and conduct business here

44. The question also appears to be one of practicality. In principle, it may be appropriate to take enforcement actions against companies incorporated outside Great Britain and Northern Ireland, for offences committed within

the jurisdiction. However, we do not consider that the Government will be able to enforce this proposal in practice.

The Government would welcome comments on (a) whether it might be appropriate for action to be taken against individual officers in relation to the offence of corporate killing; (b) its proposal that culpable officers should be disqualified from acting in a management role in any undertaking.

45. For reasons of equity and practicality the CBI believes that the offence of corporate killing must be separate from offences against persons within an organisation. There must be fairness in the powers of the enforcing authorities to obtain evidence but this must be balanced to respect the privilege of the individual against self incrimination. In practice, individuals who may provide evidence in a corporate killing case against their organisation would be circumspect in what they are prepared to say: if they may be prosecuted for that same or different offences using the same evidence. This could undermine the intentions of the law in relation to undertakings.

46. The CBI does not agree with the principle for the introduction of the offences linked to corporate killing as there are adequate sanctions for the individuals found to be to blame. The individual offence of reckless killing and those already under HSWA are sufficient. We have in any case severe reservations about the fairness of the tests proposed by the Government for deciding who could be open to disqualification. 'Any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death' is far too wide, and will be unworkable in practice. The suggestion that officers of undertakings if they "contribute" to the management failure which results in death, should be liable to a penalty of imprisonment in separate proceedings, is also unworkable as it lacks definition to be interpreted consistently and fairly. Many people may "contribute" in the strictest sense of the world but cannot be said to have actual responsibility and, therefore, should not be held to be culpable. If the impact of the offence is disproportionate to the problem it is seeking to solve then the Government could find itself involved in lengthy debates on human rights.

The Government would welcome comments on whether, in addition to the proposals made elsewhere, it is right in principle that officers of undertakings, if they contribute to the management failure resulting in death, should be liable to a penalty of imprisonment in separate criminal proceedings.

47. The CBI does not support the introduction of offences for individuals linked to the offence of Corporate Killing. These add another layer of sanctions to an already crowded field. Under the proposals, individuals might face the possibility of charges under HSWA; one of the three proposed new offences which can be brought against them as individuals; and/or proceedings against them individually, ancillary to corporate killing proceedings.

48. The risk of imprisonment will certainly focus minds, but may lead to injustices, particularly if the law is not applied consistently, or is used to pursue "soft targets" with the aim of increasing prosecution and conviction rates. The government should seek to provide a mechanism for dealing with the worst offenders with the introduction of the reckless killing offence, but not to create a climate of fear within the managerial world.

The Government would welcome views on whether criminal proceedings should be allowed to continue after the formal insolvency of a company. We would also welcome views on whether it would ever be appropriate to permit the prosecuting authority to institute proceedings to freeze company assets pending the institution of criminal proceedings on a charge of corporate killing.

49. The CBI does not consider it would ever be appropriate to permit a prosecuting authority to freeze the assets of a company. There would be serious questions about whether the presumption of innocence was being infringed and the Government would need to consider how it could compensate a company which had had its assets frozen, where a prosecution either is never brought, or is unsuccessful. It would be preferable if there were instead an anti-avoidance provision which would allow the courts to enquire into the company's finances in the event that it is convicted and a fine is imposed. Similar principles apply elsewhere in company law, such as in insolvency.

The Government would welcome views on the personal liability of those in undertakings other than a company and the freezing of assets of an undertaking.

50. All undertakings should be treated in the same way and the arguments in the above paragraph hold.

The Government would welcome comments on whether the formulation for the circumstances in which the transmission of disease might be covered by the new offences, set out in Paragraph 4:12, is appropriate.

51. The consequences of this to the provision and research of healthcare have not been thought through. There are far too many confusing factors that interfere between cause and effect for this to have a practical application and the resources required to find the evidence for a prosecution are beyond the current capabilities. A lot will depend on the definition of a ‘professional’ duty of care. Is it restricted to those registered as healthcare professionals or does it extend further.

The Government would welcome any comments on what effect the inclusion of the transmission of disease within the ambit of the offence of corporate killing would have on the number of potential prosecutions for corporate killing.

52. A lot depends on whether this is restricted to disease or whether it could be broadened to relate to an agent causing a disease. Bringing the transmission of disease within the ambit of corporate killing could have a potentially high impact on the healthcare and medical research professions. This could seriously affect Britain’s scientific base in an area where we have a world leadership position. It could also have an impact on business generally in circumstances where, for example, an employee passed on a fatal disease. To have responsibility for the management of such events undertakings would have to rely on the information from employees or possibly other individuals who have access to the workplace or may have to subject employees to invasive tests. Whether a death results from a disease is as much related to the health status, genetic predisposition and lifestyle of the recipient as the agent that causes the disease. The scientific uncertainty makes it an area inappropriate for legal intervention at present.

53. When the science is more robust the issue should be revisited.

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