General concepts on flagrant crimes. Aspects de lege ferenda and comparative law

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Abstract*: Considering the urgent need for unity in regulating the rules specific to the development of criminal trial, at the present moment most of the provisions applicable to causes form the common procedure in matter. However, in some situations the regular procedure can not compile the optimal framework for finding out the truth when dealing with files' investigation, because it is not sufficiently effective to thoroughly ensure the rights and obligations of individuals as well as to achieve the purpose of criminal proceedings. Therefore, the legislature has established a regulatory framework derogator from the common procedure, codified in title IV of the Special Part, which carries the name of special procedures and which is limitedly applied in certain concrete circumstances, mainly subordinated to the circumstances in which the offence was committed, to the type of offence or special items relating to the author of the crime. Therefore, special procedures are a complex of criminal procedure rules which establish, for certain criminal cases, a partially different development of the criminal trial from the usual procedure. The specialized literature classifies them into actual special procedures and auxiliary special procedures. Tracking and prosecuting some fragrant offenses, as the procedure in cases of juvenile offenders and as criminal liability of the legal entity, are part of the actual special procedures. The main difference between these and the auxiliary special procedures consists in the fact that within the actual ones issues, regarding the criminal liability of those who commit crimes and clarification of problems related to the existence of the main legal procedural report, are resolved while auxiliary procedures do not realize the fundamental tasks of the criminal process, but resolves through jurisdictional means certain issues related to the conduct of the criminal causes. Therefore, in the case of special auxiliary procedures a criminal trial with the purpose of criminal liability will not take place, but various tasks, directly or indirectly related to a criminal case in progress or which has already been instrumented, will be accomplished. This paper examines the legislative and doctrinal elements of general nature specific to flagrant crimes, without having to address the actual procedural aspects, but presenting, synthetically and comparatively, the regulations from the legislation of other States. Also the provisions of de lege ferenda in this field are presented and analyzed, taking into account the imminent entry into force of the new Code of Criminal Procedure.*

Keywords*: special procedure; flagrant crime; prosecution; judgment; judicial organs.*

Introduction

The evolution of the criminal phenomenon at national and European level, found in a direct causal connection with the economic crisis of recent years, requires in a desirable and imperative way the adaptation of the regulations and procedures in the field to the more evolved methods and forms of the criminal phenomenon, so as to achieve the effective creation of that security and justice space necessary to ensure social order in the European States starting from the premise that internal and external security are two sides of the same coin [1].

Committing any crimes activates the right and obligation of judicial bodies - as representatives of authority – to carry out all the activities and to take all legal measures to ensure the restoration of the infringed rule of law, implicitly the punishment of the author. Even more so, committing an illegal act in flagrance justifies both the right of the state to promptly intervene, and the necessity of special rules for their prosecution and trial, taking into account the specific features of such facts, the profound negative social impact, the need

to restore confidence to litigants and to discourage similar behaviors in the future. For these reasons, in such circumstances, the usual rules of procedure must be replaced by specific provisions, with the purpose of ascertaining and immediately gathering the evidence, which eventually could become inaccessible. In other words, in such situations, the circumstances in which the offence took place make the probation easier, almost thoroughly excluding any judicial errors [2].

The regulation of the special procedure for some flagrant crimes responds, first and foremost, to the procedural interests, because in such cases the conditions for the application of the efficiency principle in criminal procedures can be found. On the other hand, this procedure quickens the restoration of the infringes rule of law and contributes to enhancing the educational role of the criminal trial, provided that the shortening of legal proceedings do not affect the guarantees that ensure the procedural rights of the parties and the proper implementation of the act of justice, observance of the fundamental principles of the criminal process throughout its entire development is required.

Therefore, the need for a special procedure for the prosecution and trial of flagrant crimes is explained by the conditions under which this type of illicit acts are committed, which allow the quick discovery of the offence and perpetrator, establishing his guilt based on clear evidence and holding him liable in a shorter period of time compared with the ordinary procedure [3].

Based on these elements, one can almost completely eliminate the possibility of juridical errors, which facilitates the carrying out of a quick and simplified criminal procedure activity.

1. The notion of flagrant crime

From the etymological point of view, the term "flagrant" derives from the Latin verb flagro, -are, which means "to burn"; in that sense, the term " flagrance" means catching the perpetrator in the heat of action or immediately after committing it [4].

For a long time in our law but also in the legal and common language, the notion of flagrant crime was known as flagrante delicto. The current Romanian criminal law has replaced the term "delicto", with that of "crime" so that the use of the old expression is no longer justified.

According to article 465 of the Criminal Procedure Code a crime is flagrant if "it is discovered during or after it was committed. A crime is also flagrant if the offender immediately after committing the crime is pursued by the injured party, eye witnesses or public cry or is surprised close to the place the crime was committed with weapons, tools or other objects likely to involve him in the offense. In the event of a flagrant crime any person has the right to catch the offender and bring him before the authorities" [5].

Taking into account the moment the flagrant crime was discovered, the specialized literature underlines that these offences have *typical forms* and *assimilated forms*, by reference to the provisions of article 465 and 466 of the Criminal Proccedure Code.

1.1. The typical flagrant crime

The way in which the law defines flagrant offenses highlights the proximity in time between the moment the crime was committed and the moment of its discovery.

Article 465 paragraph 1 of the Criminal Procedure Code provides two situations of flagrant crime: *crime discovered the moment it was committed* and *discovered immediately after it was committed*.

The offence discovered the moment it is committed involves catching the offender during the offence and at the place it was committed. The term committing an offence is interpreted in the sense of the article 144

of the Criminal Code, meaning the accomplishment of any of the facts constituting the content of an offence in consumed form, sanctioned attempt or participation under any form: author, coauthor, instigator or accomplice.

The offence discovered immediately after it has been committed is a situation where the committing is settled as close to the moment the crime was committed. The law does not set a strict time limit, which is left to the discretion of the judicial body.

For the existence of the flagrance state it is not sufficient only to discover the offence the moment it is committed or shortly after, but also catching the perpetrator in those moments is mandatory [6].

This condition, although it is not expressly provided for by law, is understood in a justifying report for the urgent procedure of flagrant crimes, given the fact that if the perpetrator is not known, there can be no clear evidence of his guilt and hence there is no justification to use urgent and simplified procedures.

The law also stipulates that the prosecution must include in the content of the official report drawn up statements of the accused and subsequently ask for his arrest, which means knowing the perpetrator since the discovery of the crime or immediately after its commission [7].

1.2. Assimilated flagrant crime

This form of flagrant crime is also called in the doctrine quasi-typical or quasi-flagrant. Article 465 paragraph 2 of the Criminal Procedure Code mentions two situations of quasi-flagrance [8].

In the first case, the offender, immediately after committing the offence, is pursued by the injured party, eye witnesses or public cry. The injured party and the eye witnesses are the ones who after noticing the commission of an offense, immediately go right to the pursuit of the perpetrator who tries to depart from the crime scene. Those present at the commission of the offence, seeing the offenders, may call on the assistance of others through cries of help or to the authorities for pursuing and catching them. This fact represents in the specialist language - the public cry.

In the second situation, the perpetrator is surprised close to the crime scene with weapons, tools or any other kind of objects that can implicate him in the crime.

This state establishes a presumption of flagrance due to the proximity in space and time of the perpetrator to the place and time of the offence having on him any object which makes his participation in committing the crime more credible and probable. In such cases the administration of evidence should be handled with great care, because the mere capturing of a person with weapons, tools or other objects does not imply necessarily committing a criminal act.

And in the case of quasi-flagrant, the flagrance state is always conditioned by the presence of the perpetrator. In his absence the flagrant crime does not exists [9].

2. Cases of application of the special procedure concerning the flagrant crimes

The special procedure concerning the flagrant crimes is fully applied only if the conditions of article 466 of the code of criminal procedure are also met.

The first condition - *the crime must be flagrant*, is an evident condition given that the analyzed special procedure precisely aims flagrant crimes.

The second condition requires that *the offence should be punishable by law with imprisonment for more than one year and not more than 12 years*; the aggravated forms of such crimes are also included in this category.

In establishing these limits it was considered that the application of the urgent procedure is not justified in the case of minimal significance offences punishable with fine or imprisonment up to 1 year.

Thus, through the provisions of article 466 of the Code of Criminal Procedure, the legislature has limited the application of the special procedure to a certain category of crimes - those sanctioned by law with imprisonment of more than one year and not more than 12 years, as well as their aggravated forms – and the exclusion of offences sanctioned with punishments of less than a year having as a reason the low degree of social danger, which would not justify the application of special procedures.

On the other hand, the special procedure is not justified for offences of a very high gravity, because, given the increasing amount of punishment, the usual procedure guarantees must be provided, in particular the avoidance of judicial errors which can occur due to the rapid pace of the special procedure [10].

Another condition imposed by law, requires that *the offence be committed in certain places*, namely in municipalities and cities, means of transport as well as country fairs, fairs, ports, airports or train stations even if they don't belong to the territorial units referred to above, as well as in any busy place.

It is not necessary for the funfairs, trade fairs, ports, airports and train stations to belong to municipalities or cities [11], and in the case of the means of transport the condition is also considered to be satisfied if the flagrant offence takes place in the context of movement between two localities or even between a commune and a village [12].

The condition of the place of the offence has been formulated to underline the possibility of finding out whether the offence is flagrant, the agglomeration premise favors the identification of eyewitnesses, the pursuit and catch of the perpetrator immediately after committing the offence or immediately request for support from the criminal investigation organs [13].

The application of the flagrant procedure with this condition can also be explained by the fact that such crowded places are favorable frameworks that facilitate the commission of crimes, situation demonstrated also statistically, in which case the reaction of the judiciary body as well as the application of sanctions, must be as prompt as possible.

3. Cases of non-application of the special procedure concerning flagrant crimes

Article 479 of the Criminal Procedure Code provides for two cases in which the offense, although flagrant and meeting all conditions of article 466, is exempted from the application of the special emergency procedure: *crimes committed by minors* and *offences for which the prior complaint of the injured person is required*.

With regard to crimes committed by minors, because of their special situation concerning psychic development, they are protected from criminal proceedings through a special procedure applicable to them, regulated by articles 480-493 of the Criminal Procedure Code.

In the case of prior complaint - the crimes regulated by article 279 of the Criminal Procedure Code, for whose prosecution and trial a prior complaint of the injured person is required - recent changes made to the Code of Criminal Procedure have resulted in a simplification of the procedure.

From the interpretation, *per a contrario*, of the current provisions of article 479, paragraph 2 of the Criminal Procedure Code, it follows that in the case of flagrant crimes for which the setting in motion of the legal action is subjected to prior claim of the injured party, which are not committed under the terms of article 466 of the Criminal Procedure Code, or in a situation where, even if the conditions of article 466 are not satisfied, the injured person has not made the prior complaint to the criminal investigation body within 24 hours from the commission of a flagrant crime, the pursuit and trial will be held under the ordinary procedure.

4. Concurrent, indivisible and related offences

There are also situations in which, because of the links that can exist between certain crimes, the special emergency procedure may enter into contest with the usual procedure, fact which prompted the legislature to also regulate these situations.

According to article 478, paragraph 1 of the Code of Criminal Procedure, in cases of competition between offences, when special procedure applies only to some of the concurrent crimes, we proceed to disjoin them, prosecution and trial of offenses being made separately.

If it is not possible to disjoin them, given the circumstances the crime was committed in, priority is given to the common law procedure.

In the situation of indivisibility or connection of some flagrant crimes fulfilling the conditions stipulated by law for the application of urgent procedure or of some non-flagrant or flagrant crimes but who do not meet these conditions, there can be two possibilities, namely: *the flagrant crime can be disjoined from the other offences*, in which case two different procedures can be followed - for flagrant crimes the urgency procedure can be applied and for the other indivisible and related crimes the common law procedure; or *the disjoin is not possible* in which case pursuit and prosecution are to be made for all offences after the common law procedure.

Disjoin may be ordered by both the prosecution and the Court, with the specification that it does not constitute a declination of competence, but a split in the development of the criminal process, which is still running, but separately, in front of the criminal pursuit body or the Court who ordered the disjoin; for each deed the appropriate procedure – special or common law - will be applied.

5. The regulations of the New Criminal Procedure Code

The future criminal procedural provisions, estimated to enter into force starting from 01 February 2014, remove from the title of special procedures, the pursuit and prosecution of flagrant crimes [14]. However, the normative act in question contains appropriate provisions relating to this institution, even if the provisions in matter are dissipated, being included in the general part within some institutions as well as in the chapter dedicated to referral of the criminal prosecution bodies.

The first reference (indirect by the way) to the procedure which is the topic of this paper we find in the article 60 with respect to the obligation of the prosecutor and criminal research body to conduct research documents that do not suffer any delay. In this respect, the official report through which the flagrant crime is noted represents both a referral and a means of proof (so an act of criminal investigation). Of course, the rule in question, having a general character, should not be singly interpreted, but in conjunction with art. 306, paragraph 2 which particularly establishes that this obligation is to be carried out by the criminal pursuit bodies.

The specific mentioning of this institution can be found, for the first time, within article 62, paragraph 3 which gives the right to commanders of ships and aircraft to do body and vehicles searches, to catch the doer and turn him over to the criminal pursuit organs, in the case of committing a flagrant crime.

Later, in article 92 the right of a lawyer is limited to the participation in the carrying out of any criminal pursuit act; those relating to body and vehicles' search in case of flagrant crimes are also mentioned among the exceptional situations. We believe that the specificity of this kind of facts requires the previous regulation, which, in terms of observance of the procedural rights given to the suspect/defendant, does not

prejudice them in any form. The procedural guarantees granted to the category of persons mentioned above, through the rules established in the future legislation, are sufficient to ensure the exercise of rights, hierarchical control of the measures taken and prepared documents. In this sense, the control of the legality probation (with specific reference to the official rapport) in this first procedural stage will be achieved imperatively and in stages both, ex officio (originally by the supervising prosecutor - in accordance with article 293 paragraph 3, and later when checking the ordinance which ordered the commencement of criminal pursuit – according to article 3 paragraph 3), and at one's disposal, in case the defendant will want to consult the file (under article 94), or to challenge the drawn up acts (in accordance with art. 336-339).

In chronological order, the following article that contains explicit reference to this institution is 159, paragraph 3. Thus, the domiciliary search can also begin outside the time frame 06.00 - 20.00, if we are in a situation of flagrant crime.

The default regulation relating to the determination of flagrant crime can be found in the content of art. 293. According to the provisions in question, an offense fits in this category if it's discovered the moment it is committed or immediately afterwards. Also it falls in this category the offence whose doer, immediately after committing it is chased by the organs of public order and national security, the injured person, eye witnesses or public cry or presents traces which justify the reasonable suspicion that he would have committed the crime or is surprised near the place where the offense was committed with weapons, tools or any other objects that could make the authorities assume he is a participant in the crime.

The previous specifications define flagrant crimes and emphasize its features. According to article 293, paragraph 3 (identical to the regulations in force) the ascertainment of flagrant crimes is done through a written report, which shall record all the aspects established at the place of crime and the activities carried out, and which must be sent as soon as possible to the supervising prosecutor. Also, sui generis, the document in question must contain the mentions required by article 199. Together with the official report, the complaints or written claims, the corpus delicti or objects and writings recorded shall be forwarded to the Prosecutor. As regards the procedural guarantees, the provisions of article 293 imperatively establishes, as mentioned previously, the first form of control of legality of activities developed on the occasion of finding a flagrant crime.

In the section relating to the prior complaint – as a way of referral of the criminal prosecution bodies, we find in article 298 the special provisions relating to the procedure that is to be followed in case the flagrant crime belongs to the category for whom the law requires that such a complaint is necessary. Thus, the instituted provisions are imperative for the criminal prosecution bodies in terms of an infringement act even in the absence of prior complaint. Subsequently, the injured person must be called in and if he submits a complaint, the criminal pursuit continues, otherwise the file will be forwarded to the prosecutor with the proposal to be closed.

Taking into account the outrage, opprobrium and even fear created by committing a flagrant crime, the legislature has established a form of social accountability in the discouragement of such facts in the sense in which it recognized the right of any person to catch the author and turn him over to the criminal pursuit bodies. In such cases, the corpus delicti together with the objects and writings recorded shall be turned over to the criminal pursuit bodies and are going to be recorded in an official report (in accordance with article 310).

Last but not least, from the content of the regulations de lege ferenda and in indirect relation with the theme of the paper, the Presiding Judge has the obligation to establish the audience offenses (which in our view represent a form of flagrance), and, after identifying the perpetrator, draws up a concluding session that is afterwards sent to the competent prosecutor. The latter, when attending the trial can declare that he sets in

motion the criminal action, with the prerogative of withholding the accused if the legal conditions are met (art. 360).

6. Aspects of comparative law

The special procedure concerning the flagrant crimes is not provided only in the Romanian legislation; analogical regulations can also be found in the Codes of Criminal Procedure of other countries (United Kingdom, France and the United States - who have a long and effective practice in this domain).

Investigation of criminal cases concerning the flagrant crimes is regulated in the national legislation as early as 1864. The evolution in time of the rules in matter has felt the influence of French and Italian legislation, even if, in essence, its specificity was maintained. Provided for in title IV, chapter I of the Romanian Criminal Procedure Code in force and not regulated in the new Criminal Procedure Code within the title dedicated to special procedures (taking into consideration the overall changes of the future legislation concerning the celerity of criminal process, in conjunction with the current practical difficulties of effectively implementing this procedure – due to the ratio between the volume of cases under investigation and the low number of magistrates, respectively very short timescales for application) the current regulation is derogatory from the common rules of the criminal process only if the conditions provided by law with regard to offences are met.

Thus, the first imperative condition is the flagrant character of the crime (as defined in article 465), which must be applied only to cases expressly covered by article 466. The ascertainment of the deed is done through official report which must contain, in addition to the data provided by article 91, the concrete elements presented in article 467. As general rules, the accused shall be taken in detention and the investigation must be completed within 24 hours or up to 3 days from the date of issue of the retaining ordinance (in case of arrest after retention), on the contrary the prosecution will be carried out in accordance with common law.

Indictment is done through the bill of indictment of the prosecutor, who mandatory participates in the debate and the judgment which is made in compliance with the principle of material and territorial competence. The decision of the Court is subjected to appeal or recourse, as the case may be, within 3 days [15]. Referring the dossier to the Court is imperative to be done within 24 hours after declaring which is the way of attack.

In France, for flagrant crimes, since the middle ages a harsher penalty has been provided in relation to the other categories of crimes, taking into account the public opprobrium created by the commission.

However, we should not confuse the urgent procedure provided for in article 520 of the French Code of criminal procedure for the events of the law with low social danger, with the investigation in cases of flagrance, referred to in article 53 of the same code.

Similar to criminal proceedings, in the case of flagrant crimes, the investigation, indeed, goes fast, but the procedure refers to crimes (crimes of high social danger) and misdemeanors which apparently are crimes. Research is done by the better qualified workers of the criminal police, empowered in these cases with additional powers (e.g. to make searches without the sanction of the Prosecutor) [16]. Special pursuit procedure and judgment, however, applies to simpler offences, of a low risk (crimes and misdemeanors including those committed in flagrance), which is punishable with imprisonment up to 2 months or with a fine, unlike the limits regulated in our country (flagrant offences are punishable by law with imprisonment with more than one year and not more than 12 years – article 466 the Romanian Criminal Procedure Code).

The main procedural act also is in this case an official report. Simple cases are examined by a single judge, the ones with an average severity by three judges. The trial takes place with the participation of the

Prosecutor and the defense. The procedure is oral, formal and in contradiction. Court sentences may be appealed either at the Police Court, or Tribunal correctional [17].

Unlike France, in the United Kingdom the proceedings in the flagrant cases with medium danger are investigated and prosecuted by means of a simplified methodology. This happens in cases like: violation of the rules governing the means of transport, causing bodily injury, theft by burglary, kidnapping and rape.

In this system of law it is not necessary to draw up the accusation conclusions, to hand over the accused to the Court and other guarantees. Being fully simplified, these components are personally examined by judges, without jury, and the sentence may be based on incomplete or insufficiently verified data. Examination in court only takes a few minutes and the judge usually accepts the conclusions of the police officers, which in this case have the quality of witness.

United States of America applies the procedure for flagrant cases, in respect to offences with low social danger. These cases are settled in the lower level courts. Often when a person is brought to court in order to decide on his preventive measure the sentence is also applied.

If the defendant agrees with the procedure, the judge determines the ratio of involvement in terms of the charges what are brought. If the defendant pleads guilty, the judge decides the punishment in no time. If the defendant pleads guilty, the judge decides the punishment in no time. In the event that he pleads not guilty, the offender is given 30 days to prepare his defense, fallowed then by all the phases of the judicial examination (judicial inquiry, debate, etc.) [18].

In some cases, lawyers, with the client's consent, opt for the recognition of the less serious offence, thus leaving the case in the procedure of a particular judge, with which it is easier to conclude a deal on the sentences.

Procedure in the case of flagrant crimes in the legislation of the Republic of Moldova has experienced an evolution identical to the socio-political transformations in the post-communist society.

Essential changes occur since 1995, after the establishment of the Republic of Moldova as an independent State and the most important innovation regarding the discussed institution is the introduction of the term flagrant (article 370 "judicial proceedings" begin with: "judicial proceedings in flagrant criminal cases ...".

Through the Code of Criminal Procedure of 2003, the procedure of flagrant crime was included in the category of special procedures along other cases regarding minors, pursuit and prosecution of legal persons or guilt recognition procedure [19].

Similar to the laws of our country, the basic procedural document is also the official report, which must be submitted to the prosecutor within 24 hours from the ascertainment and the indictment is made only by the public prosecutor, who may order the commencement of the trial. In the situation where the prosecutor considers that there aren’t sufficient grounds to put the person under accusation, he disposes the continuance of the criminal prosecution specifying the actions that are to be carried out and establishes the deadlines necessary for this.

The perpetrator may be corporally examined, searched (under the ordinance of the prosecutor or with his consent), detained or his assets can be put under seizure. In these cases the investigating judge must be informed within 24 hours from the arrangement of the measure. The deadlines are short - 10 days for delivery of new evidence, if it is necessary, respectively maximum 5 days from the moment the dossier is registered to court, for the purposes of the case.

The way the law defines the flagrant crimes in the legislation of this country is also similar to the one in Romania, through the conditioning given by the time proximity between the moment the crime is committed and its discovery. It is taken into account the time that the flagrant infringement was discovered.

In the specialty literature, it is shown that such offences have assimilated forms and typical forms (quasi-flagrance - the pursuit of the perpetrator immediately after committing the offence by the person injured, eyewitnesses or public cry). The same regime also includes the definition of the state of flagrance, always conditioned by the presence of the perpetrator, in whose absence the offence is not deemed flagrant. In addition, the offender shall be granted the same rights as the defendant, in terms of knowledge of the dossier's materials.

The peculiarities of criminal prosecutions and trials in the flagrant cases in all these States, demonstrate the variety of regulations, but at the same time the fact that the procedure in flagrant cases has a fairly wide and effective applicability altogether justifies its implementation.

Making an analysis of the various opinions and presenting the analog procedures of other countries, it can be asserted that the procedure in flagrant cases is an independent procedural form, used in many countries, able to ensure, in the field of applicability, the correct realization of justice.

Conclusion

Comparing the evolution in time of the rules relating to special procedures, mainly the provisions in question before 1 January 1969 (which included a considerable number of derogating rules - the example of the specific procedures applicable to offences against public property and those relating to offences against State security, later removed), with those in force and de lege ferenda, it can be said that the procedure in cases of flagrant crimes represents an independent form of procedural activity conducted by the prosecution in the case of infringements with low social danger caused in conditions of flagrance, whose primary purpose is to bring closer the penalty to the time of the offense.

In this respect the essential idea expressed by the doctrine is that the procedure in flagrant cases provides the most efficient, qualitative and of immediate impact solution, on the attainment of the criminal process.

The necessity of the existence of a derogation procedure in the case of flagrant offences is proven by the effectiveness recorded, in most cases, in terms of resolving the files. Moreover, as I have shown above, there are also similar procedures in other countries, which show that this procedural form must exist and must be constantly improving, in order to provide the most effective combat of criminality.

Starting from the premise that it is more than certain that the procedure in the case of flagrant offences constitutes a procedural order capable to ensure an effectively combat crime phenomenon in the current stage, the application of the provisions of the special procedure does not eliminate, but completes the common rules of the Code of Criminal Procedure; any cause solved only on the basis of derogatory items cannot be considered to be correctly and completely instrumented.

In connection with the coding of this institution in the new Code of Criminal Procedure, even if it is no longer included in the title dedicated to special procedures (probably for the reasons set out above), the adequate regulations make us optimistic regarding the practical efficiency.

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