

Postopek za izdajo plačilnega naloga na Nizozemskem

ANNA LEONARDA HUBERTINA ERNES

Povzetek

Nizozemski postopek za izdajo plačilnega naloga, ki je bil precej podoben sedanjemu evropskemu postopku za izdajo plačilnega naloga, je nadomestil postopek za izterjavo nespornih zahtevkov v čezmejnih zadevah, čeprav ne za nacionalne primere. Kljub temu, da nizozemska zakonodaja omogoča vložitev zahteve za pridobitev evropskega plačilnega naloga prek elektronske pošte, se to še ne izvaja. Vloge (v nizozemščini) za izdajo evropskega plačilnega naloga se lahko vložijo pri okrožnem sodišču v Haagu. Na Nizozemskem obstajata dva načina vročitve evropskega plačilnega naloga toženi stranki. Lahko se ji pošlje s priporočeno pošto ali pa ji ga vroči sodni uslužbenec. Nizozemski zakon o izvršbi ni uvedel nobenih posebnih formalnih zahtev za opozicijsko izjavo tožene stranke. Ugovor na Nizozemskem ni treba obrazložiti. Revizijski postopek je nizozemskemu civilnemu postopku nepoznan postopek. Je pa podoben nizozemskemu postopku, v katerem tožena stranka vloži pritožbo zoper odločbo v postopku, v katerem je bila odsotna (sodba *in absentia*).

Ključne besede: • postopek za izdajo plačilnega naloga • dostop do varstva pravic • centralizacija postopka • ugovor • revizija • evropski plačilni nalog • nizozemski plačilni nalog

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The Payment Order Procedure in the Netherlands

ANNA LEONARDA HUBERTINA ERNES

Abstract

The Netherlands used to have a national payment order procedure that was quite similar to the present European Order for Payment Procedure. This procedure was replaced by a procedure for the recovery of uncontested claims in cross-border cases, though not in national cases. Although the Netherlands legislator allows filing a request to obtain a European order for payment via email, it has not yet come into force. Applications (in Dutch) for a European order for payment may be submitted to the district court in The Hague. There are two ways in the Netherlands for serving the defendant with an European Payment Order. It can be sent to the defendant by registered mail or it can be served by a bailiff. The Dutch Execution Act has not introduced any specific formal requirements for the defendant's statement of opposition. The opposition in the Netherlands does not have to be reasoned. The review procedure is a procedure unfamiliar to Dutch civil procedure. However, it resembles a Dutch procedure in which a defendant appeals against a sentence of a procedure in which he did not appear in court (decision in abstentia).

Keywords: • order for payment procedure • access to justice • centralization of the procedure • statement of opposition • review • European order for payment • Dutch order for payment

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1. General Remarks Concerning The Netherlands and the European Payment Order Procedure

1.1. The Netherland's input during the creation of the European Order for Payment Procedure

The current European Order for Payment Procedure¹ is the outcome of a long process of negotiations within Europe. The Committee-proposal dates back to March 2004.² The Netherlands' aim during these negotiations was to create a new procedure that would be highly practical and easy to use. In order to achieve this target The Netherlands consulted its national Council for the Judiciary (*Raad voor de Rechtspraak*), the State Committee on Private International Law (*Staatscommissie IPR*) and the Advisory Committee on Civil Procedure (*Adviescommissie BPR*) immediately from the start of the negotiations (Van der Grinten, 2010: 108–129). The Netherlands also installed a project group consisting of a bailiff, a district court judge, a member of the Council for the Judiciary, a representative of the Association of Attorneys and representatives of the Ministry of Justice's financial, policy and legislative departments. This project group analysed every article of each new version of the proposed European Order for Payment Procedure. The influence of this project group can be shown in the following example. It was proposed by the Justice and Home Affairs Council (JHA) in April 2005 under the Presidency of Luxembourg that Member States had the liberty to require documented evidence of claim(s). This preliminary proposal was opposed by The Netherlands and Germany on the basis of practicality and costs.³ The opposition was successful, it resulted in the creation of the rule that a claimant under the European Order for Payment Procedure only needs to describe the evidence supporting his claim, Article 7(e) of the Regulation creating European Order for Payment Procedure. Documented evidence of the claim is not required. The present version of Article 7(e) was accepted by the JHA in December 2005 under Great Britain's presidency.

¹ Regulated by Regulation (EC) No 1896/2006 creating a European Order for Payment Procedure (OJ L L 399, 30.12.2006, p. 1–32).

² Proposal for a Regulation of the European Parliament and of the Council creating a European Order for Payment Procedure, COM 2004/173 def. (presented by the Commission 19.3.2004).

³ The argument was that the translation of the required documents would be a costly affair, which would put the efficiency of the procedure at risk.

1.2. Amendment of the national procedural law of the Netherlands regarding orders for payment

The European Order for Payment Procedure, neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law. It is however an additional procedure that needed implementation in Dutch procedural law. The Netherlands did not previously have a procedure for the recovery of uncontested claims (recovery of uncontested claims procedure).

The act, implementing the European Order, entered into force on 10 June 2009.⁴ As a result the Netherlands now have a procedure for the recovery of uncontested claims in cross-border cases, but not in national cases. Similarly the Netherlands do have a European small claims procedure, but not a national small claims procedure.⁵

It is interesting to point out that previously, since 1942, The Netherlands possessed a national payment order procedure (*betalingsbevelprocedure*) that was quite similar to the present European Order for Payment Procedure (Hugenholtz, 1988:119–121). The original Dutch payment order procedure laid down proceedings for claims below *f* 2.500. The original 1942 procedure was abolished in 1991 because it was very rarely used⁶ mainly because of the prohibitive cost of administration fees and the bailiffs' negative attitude towards the payment procedure (Kramer, 2007: 1–8).

In 1991 a new type of access to justice was introduced in The Netherlands. The claimant could simply address the court's registry office, using a summons form.⁷ The court's registry office would then send this form to the defendant by registered mail (former Article 104 of the Civil Procedure Code). The purpose of the procedure was to facilitate the claimant's access to justice, since the claimant was allowed to fill in the summons form without representation by an attorney (Hugenholtz, 1991: 119). Once the defendant had been informed of the summons, a regular procedure would follow. The summons form thus did not result in a payment order.

⁴ Act of May 29, 2009, *Staatsblad*, 2009, 232 (referred to as Dutch Execution Act).

⁵ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1–22).

⁶ This procedure was abolished by the Act of January 31, 1991 *Staatsblad* 50, which came into effect on December 30, 1991.

⁷ This form was available for free.

This procedure was abolished on 1 January 2002.⁸ It had become clear that the procedure proved to be too difficult for many claimants. In addition, it caused often delays because of many people's failure to correctly complete the form, requiring claimants to rectify / correct it. Lastly, the registered letter often remained uncollected or unaccepted by the defendant, which meant that a *subpoena* still had to be served.⁹

Currently, whenever a claimant in a domestic case wishes to obtain payment of his claim, he has to use the writ of summons procedure. It is not uncommon for the defendant to fail to appear in court, leading to a decision to be made in favour of the claimant after a quick (one sided) procedure (*verstekprocedure*). Though defendants have a right to appeal (*verzetprocedure*),¹⁰ these appeals are rare in practice.

As previously stated, the European Order for Payment Procedure has been implemented in the Netherlands. Thus, the question can be asked whether, since the implementation, many claimants have used this new cross-border procedure. I have only found two published procedures until this date.¹¹ In both procedures the defendant opposed the claim. I would guess, however, that procedures in which no opposition takes place are rarely published.

2. How to file an application

The Dutch Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*) lays down a dualistic system for access to justice. The names of these procedures are derived from the way the proceedings are formally instituted in the Code. A procedure can be initiated by a writ of summons (or *subpoena*), issued by the plaintiff and served to the defendant through a bailiff (*dagvaardingsprocedure*). On the other hand a procedure can be submitted by a request addressed to a judge (*verzoekschriftprocedure*).

As the European Order for Payment Procedure is seen as a request procedure, this leads to the applicability of Articles 278 and 33 of the Civil Procedure Code. According to Article 278 a request procedure can be initiated by handing in the request at the court's registry office, by sending it to the court via (regular) mail, by dropping it off in the mailbox of the court's

⁸ Law of December 6, 2001, *Staatsblad* 2001, 580 and 623, also Parliamentary History: Parl. Geschiedenis *Wetboek van Burgerlijke Rechtsvordering*, Kluwer Deventer 2002.

⁹ Parliamentary History 26 855 nr. 5, p. 47.

¹⁰ Articles 143–148 Netherlands Code of Civil Procedure.

¹¹ *Rechtbank Almelo* February 28, 2010, LJN: BL9357 and *Rechtbank Arnhem* 9 juni 2010, LJN: BM 9498 (*Spedition Balter GmbH & Co KG/Expeditiebedrijf Bakker BV*).

registry office or by fax. Since 2008, Article 33 of the Dutch Civil Procedure Code also enables such request to be filed by email.¹² However, Article 33 states that a request via email is only possible if it is allowed in the procedural rules of the specific court where the request was made. This condition proves to be a problem. According to Article 1.1.3 of the National Rules for Request Procedures it is not yet possible to send in a request via email.¹³ Therefore, although the Dutch legislator allows the filing of a request via email, it is not yet a procedure that is possible in practice. Unfortunately, the request to receive a European Payment Order by email suffers the same fate in The Netherlands.

The Council for the judiciary's website¹⁴ requires the forms to be filled out in Dutch.¹⁵ The website contains a link to the forms A to G. *Freudenthal* has voiced her regrets that the use of English to complete the forms is not allowed (Freudenthal, 2008: 2366–2369).

3. Where to file an application

According to the Dutch Execution Act, a claimant who wants to request a European Payment Order in the Netherlands has to file it with the District Court (*rechtbank*). Depending on the amount of money involved, the claimant has to file his request either with the civil law section of the District Court (*sector civiel*) or with the cantonal section (*sector kanton*). The cantonal section's jurisdiction is limited to requests up to € 5.000. Furthermore, cases concerning labour law or landlords and tenants are always within the specific jurisdiction of cantonal courts, no matter what financial amount (Article 93 of the Dutch Civil Procedure Code). In a Draft of the Act (32 021) this article has been amended so as to provide jurisdiction to the cantonal chamber of the district court in cases up to € 25.000. It is likely that this new law will enter into force on 1 January 2011.

¹² Act of March 20, 2008 (Wet Afschaffing procureaat en invoering elektronisch berichtenverkeer). This act came into effect on September 1, 2008, *Staatsblad* 2008, 100.

¹³ Also, this article states that a request can only be filed by fax if it amounts to less than 20 pages.

¹⁴ <http://www.rechtspraak.nl/Naar+de+rechter/Formulieren/Europese+betalingsbevel+procedure.htm> (visited: 03.09.2010).

¹⁵ According to Article 2.6 Paragraph 1 Algemene Wet Bestuursrecht. If the Order for Payment Procedure could have been filed in the province of Friesland, also the Frysian language would have been allowed (Article 2.10 Algemene wet Bestuursrecht), since Frysian is also an official language in the Netherlands by Act of May 11, 1956, *Staatsblad* 1956, 242 and Act of September 14, 1995, *Staatsblad* 440.

This specifically Dutch system, however, is very complicated for foreign claimants. The Ministry of Justice has drafted a revision of the law, which provides exclusive jurisdiction for the procedure in the court in The Hague. On 11 March 2010, the Ministry of Justice asked the Dutch Association for the Judiciary's (Nederlandse Vereniging voor Rechtspraak) advice on this Draft. By letter of May 3, 2010 the requested advice was delivered. In the opinion of the Association the wish to concentrate the procedure at the court in The Hague is understandable.

According to Article 2 of the revised Act the claimant who wishes to request a European Payment Order, has to file a claim at the court in The Hague. No distinction is made between cases that would usually fall within the jurisdiction of the civil law section or the cantonal law section of the district court. All claims fall within the jurisdiction of the civil law section. This is a big advantage for claimants, who will not have to worry about the jurisdiction of the district court sections.¹⁶ The second paragraph of Article 2 states that, if a claimant has mistakenly filed his request in any other Dutch court, that court will relegate the case to the district court of The Hague.

Remarkably, this access to justice already exists in practice. For the proceedings of European Orders for Payment, the District Court in The Hague has been designated as ancillary court hearing location for the courts in Alkmaar, Almelo, Amsterdam, Arnhem, Assen, Breda, Dordrecht, Groningen, Haarlem, 's-Hertogenbosch, Leeuwarden, Maastricht, Middelburg, Roermond, Rotterdam, Utrecht, Zutphen and Zwolle, based on a directive decree from the Netherlands Council for the Judiciary (*Raad voor de Rechtspraak*) with reference to Article 8 of the Decision on ancillary domiciles and ancillary court hearing locations dated 8 December 2008 and published in the Government Gazette on 11 December 2008 (*Staatscourant* 2008 – 241), applicable as of 12 December 2008.¹⁷

Applications for a European order for payment may be submitted to the:
Rechtbank's-Gravenhage/District Court in The Hague
Sector Civiel Recht/Sector Civil Law
Algemene Zaken/General Affairs
Postbus 20302/P.O. Box 20302
2500 EH Den Haag/2500 EH The Hague

¹⁶ *Sujecki* elaborates in his work on the advantages of exclusive competence (Sujecki, 2008: 222).

¹⁷ <http://www.rechtspraak.nl/Naar+de+rechter/Formulieren/Europese+betalingsbevel+procedure.htm> (visited: 3.9. 2010).

The website European Judicial Atlas in Civil Matters: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_courtsJurisd_nl.htm provides an overview of the courts having jurisdiction in the various member states, in some cases even with their addresses and phone numbers.

4. Required documents

Since the translation costs of documents for the European Order for Payment Procedure were considered excessive to a claimant, the EU decided that no written evidence has to be handed in by the claimant. The claimant has to state sufficient facts and elements of proof to enable the defendant to make an informed decision whether or not to oppose the claim according to Article 7(e) of the Regulation creating European Order for Payment Procedure (see also Article (1)(1)). In the Netherlands, the court requires payment of the court fees by the claimant before the request will be dealt with (Sujecki, 2009: 51–52).

5. The procedure

If all the requirements of Article 8 of the Regulation creating European Order for Payment Procedure are met, the Dutch court will issue a European Order for payment, as soon as possible (usually within 30 days following the initial request). The Dutch court will see to it that the European Payment Order is served to the defendant in accordance with Dutch national law and Articles 13–15 of the Regulation creating European Order for Payment Procedure.

Article 13 of the Regulation creating European Order for Payment Procedure has been transcribed into Article 5 of the Dutch Execution Act. This article provides two methods for serving the defendant in the Netherlands with the European Payment Order. It can be sent to the defendant by registered mail, followed by the defendant's signature on receipt of the Order (as in Article 13(c) of the Regulation creating European Order for Payment Procedure). The second method is to serve the Payment Order by bailiff. Both methods are in accordance with the minimum requirements of Articles 13 and 14 of the Regulation creating European Order for Payment Procedure.

What were the reasons for these two choices by the Netherlands legislator? It was expected that business creditors who mainly be the claimants and defendants the consumers. Consumers are seen as the vulnerable party, whose official addresses don't always match their factual addresses. It was

also considered unlikely that consumers would voluntarily go to the post office to receive a Payment Order and to return a signature card (Van der Grinten, 2010: 116). Therefore, realistically, the risk would exist that the defendant would not react to the request to return the signature card on receipt of the Payment Order. To avoid this risk, the Dutch legislator adopted as a second option, the method of serving the Payment Order through a bailiff.¹⁸ Then, a bailiff is engaged by the court to serve the Payment Order to the defendant. This is a novelty in Dutch civil procedure law. Usually a bailiff is engaged by the plaintiff or claimant to serve documents, not by the court.

In case the defendant resides in a different member state than the Netherlands, the payment Order will be served to him on the basis of Article 277 of the Civil Procedure Code, in accordance with Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000^{19,20}

Loos, who has analyzed the payment order procedure from the perspective of the consumer, has concluded that consumers do not seem to profit from the European Order for Payment Procedure (Loos, 2010: 53–54). If the consumer is the claimant, he will often be confronted with an entrepreneur denying any liability and opposing the claim. In that case, the procedure will continue as a regular procedure. If, on the other hand, the consumer is the defendant, he will have to pay or oppose the claim. Again, the procedure will be continued as a regular procedure. What is then the advantage of the European Order for Payment Procedure for a consumer? In my opinion, however, the arguments of *Loos* are not valid as the European Order for Payment Procedure is not supposed to be a means of consumer protection. The purpose of the Regulation is mainly to speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims in general. The Regulation was not aimed to support or protect a specific group/category of people.

When the Payment Order has been received by the defendant, three possibilities arise: First the defendant may pay the required amount and thus fulfil the claim. Secondly, the defendant can lodge a statement of opposition

¹⁸ Parliamentary History 31 513, nr. 3 p. 13 (Parlementaire Geschiedenis Kamerstuk 31 513 Memorie van Toelichting nr. 3 p. 13).

¹⁹ OJ L 324, 10.12.2007, p. 79–120.

²⁰ Parliamentary History 31 513, nr. 3 p. 12.

to the European Order for Payment within 30 days. Thirdly, the defendant does not lodge this statement.

In the first case, the European Order for Payment Procedure will come to an end. In the second case, the European Order for Payment Procedure equally comes to an end (Article 17 of the Regulation creating European Order for Payment Procedure) and the procedure will then be continued according to the national procedural rules, unless the claimant has explicitly opted to terminate the procedure. If the case is continued under Dutch law, Article 6 of the Dutch Execution Act applies. The court has to put the parties on the track of either the writ of summons procedure or the request procedure.²¹ In case the claim amounts to more than € 5.000 the parties will have to be represented in court by an attorney, unless the case is within the jurisdiction of the cantonal court. If the claimant has explicitly requested to terminate the procedure through a statement of opposition, the court will notify the parties accordingly.

Thirdly, it is possible for the defendant not to lodge a statement of opposition to the European Order for Payment within 30 days. In that case the Dutch court will declare the European Order for Payment enforceable without delay (Article 18 of the Regulation creating European Order for Payment Procedure).

6. Effects of the order for payment

When the claimant has succeeded in obtaining a European Payment Order, the next question is whether he can enforce the Order. According to Article 7 of the Dutch Execution Act, the payment order (standard form E), combined with the declaration of enforceability (in form G) constitute the legal basis for the enforcement of the Payment Order. Article 430 of the Dutch Civil Procedure Code regulates the enforcement order and applies as well to European Payment Orders. Applicability of the general Article 430 of the Dutch Code of Civil Procedure lays down the requirement that both the payment order and the declaration of enforceability (standard forms E and G) are headed by the words: *'In naam der Koningin'*.²² Then, according to Article 8 of the Dutch Execution Act, the copy of a foreign enforceable European Order for Payment (Articles 18 and 21 of the Regulation creating European Order for Payment Procedure) can be executed similar to a Dutch court ruling (*grosse*).

²¹ Following the rules under Article 69 of the Dutch Civil Procedure Code.

²² In the name of the Queen.

7. The defendant's role

According to Article 16(3) of the Regulation creating European Order for Payment Procedure, the defendant may lodge a statement of opposition to the European order for payment without having to specify the reasons for it. The Dutch Execution Act has not introduced any extra demands for this statement of opposition, thus indicating that the opposition in the Netherlands does not have to be reasoned. In addition, Article 11, paragraph 2 of the Dutch Execution Act states that the defendant does not have to pay a court fee when he lodges a statement of opposition.

7.1. The defendant lodging a statement of opposition

If the defendant lodges a statement of opposition, the procedure will be continued according to the Dutch civil procedure rules, unless the claimant has opted to end the procedure (Article 17(1) and Article 7(4) of the Regulation creating European Order for Payment Procedure). If the procedure has (been) ended, the parties will be informed to that effect by the court. If, on the other hand, the procedure continues under Dutch law,²³ the judge will have to consider whether this procedure is a request procedure or a writ of summons procedure and put the parties on the right track.²⁴ As previously mentioned, the parties must be represented by an attorney if the value of the claim exceeds € 5.000.²⁵

In case the procedure is continued under Dutch law, Dutch law does not state whether the Order is annulled or whether the court will decide about the fate of the Order in the subsequent litigation. In my opinion, the Order does not have to be annulled nor does it have to be decided/litigated upon, since the order was not yet enforceable (Article 12(4)(b) of the Regulation creating European Order for Payment Procedure). In the subsequent national civil procedure, the claim and the objection will have to be weighed according to the rules regulating Dutch civil procedure.

²³ In case of the continuation of the procedure under Dutch law, the defendant will have to pay the regular court fee, Article 11, paragraph 3 of the Dutch Execution Act.

²⁴ According to Article 6 of the Dutch Execution Act, combined with Article 69 of the Dutch Civil Procedure Code.

²⁵ As mentioned before, in a Draft of Act (32 021) this Article was/is amended, so that the cantonal chamber of the district court will have jurisdiction in cases up to € 25.000. This new act will probably enter into force on 1 January 2011. This will then also have as a result that parties only need the representation of an attorney in claims exceeding € 25.000.

Whether or not the defendant appears in court, the court sentence nonetheless is qualified as a contradictory sentence.²⁶ If the defendant failed to show up in court, the sentence will be sent to him by mail. The defendant has a right to appeal (*verzetprocedure*).²⁷

7.2. The defendant failing to lodge a statement of opposition

If the defendant does not lodge a statement of opposition within a period of 30 days of the order having been served, the court will declare the European order for payment enforceable (Article 16(2) and Article 18 of the Regulation creating European Order for Payment Procedure). Dutch law does not state if the absence of an objection to the claim has to be viewed as an acknowledgment of the claim or as an admission of facts. The effects of the Order for payment are mentioned in Paragraph 6.

7.3. Review in exceptional cases

According to Article 20 of the Regulation creating European Order for Payment Procedure, the defendant is entitled to apply for a review of the European Order for Payment after the expiration of the time limit laid down in Article 16(2) of the Regulation creating European Order for Payment Procedure. Three grounds allow an application for review: First, if the order for payment was served according to one of the methods mentioned in Article 14 and the service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part (Article 20(1)(a)). Secondly, if the defendant was prevented from objecting to the claim by reason of *force majeure* or due to extraordinary circumstances without any fault on his part (Article 20(1)(b)). Thirdly, if the order for payment was clearly wrongly issued, having regard to the requirements of the Regulation creating European Order for Payment Procedure, or due to other exceptional circumstances (Article 20(2)). This procedure resembles the review procedure of Article 19 of the Regulation creating European Enforcement Order for uncontested claims, although in the latter regulation the procedure is given as a minimum standard.²⁸

²⁶ Article 6, paragraph 2 of the Dutch Execution Act.

²⁷ Articles 143–148 of the Dutch Civil Procedure Code.

²⁸ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.04.2004, p. 15–39).

This review procedure is a procedure with which the Dutch civil procedure was previously unfamiliar. However, it resembles the procedure in which a defendant appeals a court sentence of a procedure in which he did not appear in court (*verzet* procedure).²⁹ The new review procedure has been implemented in Dutch law in Article 9 of the Dutch Execution Act. Apart from the requirement to ‘act promptly’, the European Order for Payment Procedure does not mention a time period for the application for review. In Article 9 paragraph 2 of the Dutch Execution Act the time period given to the defendant is 4 weeks. Representation by an attorney is not required in the application for a review.³⁰

8. Conclusion

The European Order for Payment Procedure is a very practical EU-initiative to pursue uncontested claims in cross-border cases. In the Netherlands the District Court in The Hague has been given exclusive jurisdiction, which is very helpful for foreign claimants. It would be advantageous if the Netherlands would adopt a similar procedure for national cases.

²⁹ Article 143 of the Dutch Civil Procedure Code.

³⁰ Article 9 paragraph 3 of the Dutch Execution Act.

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