

LEGAL PROVISIONS FOR ELECTRONIC ADVERTISING

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ABSTRACT:

With the emergence of e-commerce and the term e-consumer, the term electronic advertising has also raised. It does not differ from traditional advertising except in terms of the modern technological means of communication that are used in the presentation, so that the electronic consumer is faced with a huge amount of advertisements, some of which may be undesirable and some may be misleading, especially since this type of advertising has recently spread a lot in Algeria due to the low financial cost of its preparation

key words: advertising, e-commerce, e-consumer, misleading

Introduction:

The right to electronic advertising has become an imperative necessitated by the effects of the terrible creativity and continuous innovation of modern technological means related to communication and media, as advertising is considered a means of enticing the consumer and pushing him to influence him psychologically to buy products or services.

Electronic advertising is considered a form of creativity and mental innovation because it is embodied in an artistic appearance that attracts attention and draws the attention of people, as it depends on continuous repetition and

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highlighting the idea to the recipient using all that would affect the psychological impact of inspiring the imagination and attracting the eye, all with the aim of stimulating demand for products and services¹, it is only the result of a contract between the advertiser and the advertising agency and is a category of contracts concluded and executed via the Internet or any other electronic means and is one of the unnamed contracts as the first requirement. The Algerian legislature has not specialised it with a special legal regulation.

E-commerce at the present time is often preceded by advertising or promotional publicity for the good or service that the e-supplier wants to market, and thus electronic advertising has become one of the most important aspects of commercial activity, but as electronic advertising may be truthful, it may be misleading and contain fraud that may harm the health or safety of consumers, so the Algerian lawmaker has surrounded electronic advertising with a set of legal provisions contained in Law No. 18/05 on Electronic Commerce, in order to protect the consumer in general.

Based on the above, we decided to pose the following question: What is the legal basis for electronic advertising?

In order to answer this question, we divided our research plan into two sections, where in the first section we dealt with the concept of electronic advertising, while in the second section we tackled the nature and conditions of electronic advertising, using a descriptive and analytical approach in our study.

The first section: The concept of electronic advertising

In this paper, we will deal with the definition of electronic advertising and identify its characteristics because through the definition we can root the legal provisions of any legal term. Thus, in the first requirement, we will deal with the definition of electronic advertising from the jurisprudential and legislative point of view, while in the second requirement, we will try to highlight the most important characteristics that characterise electronic advertising.

First requirement : Definition of Electronic Advertising

Every means aimed at psychologically influencing the public in order to achieve commercial goals is considered advertising (07). Electronic advertising does not differ from traditional advertising except in the means used, which are modern means of communication represented by electronic devices equipped with Internet service, so we can say that electronic advertising is only a means aimed at

¹ Batoul Sarawa Abadi, altadhilil alialani altijari wa atharoho ala almostahlik dirasa moqarina (Commercial Advertising Misleading and its Impact on the Consumer - A Comparative Study) - First Edition, Mansurat Al-Halabi Jurists Lebanon, 2011, page 19.

offering a product or service to the public by any of the electronic means in an attractive manner for a fee, with the aim of attracting the largest possible number of consumers to contract.

We have divided this requirement into two subsections, where in the first section we will deal with the jurisprudential definition of legal advertising and in the second section we will deal with the legislative definition of electronic advertising.

First subsection: Jurisprudential definition of electronic advertising

From the jurisprudential point of view, there are some legal scholars who defined advertising according to its purpose as "any behaviour aimed at attracting the customer or client, regardless of the form it takes and the person to whom it is issued or directed", and some defined it as "a communication undertaken by a professional person with the intention of introducing a specific product or service by highlighting its advantages and praising its virtues in order to leave an acceptable

impression of it to the audience that leads to his interest in the products and services subject to the advertisement."

There are also those who defined it by looking at the means of advertising as "every message directed by a professional to the public with the aim of urging him to request money or services, including, for example, a poster on the street, a page in an illustrated magazine or an advertisement on television".

It is also defined as "the tempting offer of anything that can be legally transacted for a known fee by means of advertising in order to accept this thing by buying, using, exploiting or practising it", it is also defined as "every means aimed at psychologically influencing the public for commercial purposes" and it is "a technique with a psychological effect practised on the public for utilitarian purposes".¹

There are also those who define it as "any act or behaviour aimed at psychologically influencing the consumer audience in order to convince them of the advantages of a good, service or idea and the benefits it can achieve, regardless of the means used"².

¹ Ali Khoja Khaira, al-dhamanat al-kanonia li taawidh almostahlik ani aladhrar bi salamatih fi altachria aljazayri, (Legal guarantees of consumer compensation for harm to safety in Algerian legislation,) Thesis submitted for the degree of Doctor of Legal Sciences in Contracts and Liability, Faculty of Law and Political Science, Mohamed Khaider University of Biskra, 2015/2016, p. 77.

² Khemikhem Mohamed, al-himaya al-jianayia lil mostahlik fi oqoud altijara aliliktronia dirassa mokarina – (Criminal protection of the consumer in e-commerce contracts - a comparative study), thesis submitted for the degree of

There are also some legal scholars who defined it as "a group of impersonal efforts aimed at directing the attention of members of society to a specific good or service to urge them to buy or order it, or it is the various types of activities through which visual or audible advertising messages are published or broadcast to members of society, with the aim of urging them to buy the advertised good or service¹".

There are also those who defined it as any means aimed at psychologically influencing the consumer, the purpose of which is to introduce and promote products or services by showing the advantages of the product or service with the aim of satisfying and convincing the consumer to contract.

However, in our opinion, the most comprehensive definition of electronic advertising is an advertisement that is published on the Internet with the aim of promoting a good, marketing a service or advertising for websites or others²

The American Marketing Association (AMA) also defined it as "the various aspects of activity that lead to the publication or broadcast of visual or audible advertising messages to the public for the purpose of urging them to buy goods or services, or to lead them to accept the ideas, persons or organisations advertised."³

Section II: Legislative definition of electronic advertising

As for the legislative definition of advertising, the Algerian legislator defined it in Executive Decree 90/39 on Quality Control and Suppression of Fraud in its second article that advertising is "all suggestions, invitations, offers, advertisements, publications or announcements designed to promote the marketing of a good or service by means of visual or audiovisual⁴

It is noticeable from this definition that the legislator used most of the terms that can be understood as advertising, as he considered that suggestions, advertisements, offers, advertisements or publications all fall within the framework of advertising, provided that they are aimed at promoting goods or services.

Doctor of Public Law, Faculty of Law and Political Science, Aboubaker Belkaid University of Tlemcen, 2016/2017, page 28.

¹ Grevely Mohamed, himayat almostahlik fi nitaq alaql (Consumer protection in the scope of the contract), thesis submitted for the degree of Doctor of Laws, specialised in in-depth private law, Faculty of Law and Political Science, Ahmed Daraya University, Adrar, 2017/2018, page 85.

² Fatih Ben Khaled and Kaira Souad, alhimaya aljinayia lil mostahlik mina alichhar aliliktroni al ghayr morahab bihi –ichharat albarid aliliktroni namothajan- majalat albiban lil dirassat alkanounia w alsiyasia (Criminal protection of the consumer from unwelcome electronic advertising) - email advertisements as an example - Al-Biban Journal of Legal and Political Studies, Vol. 03, No. 01, June 2018, page 71.

³ Bouras Mohamed, alichhar aani almontajat wa alkhidmat (dirassa mokarina) (Advertising of products and services)(comparative study), thesis submitted for the degree of doctorate in private law, Faculty of Law and Political Science, Aboubaker Belkaid University of Tlemcen, 2011/2012, page 09.

⁴ Executive Decree No. 90/39 on Quality Control and Suppression of Fraud of 30/01/1990, Official Gazette of 31/01/1990, No. 05

The Algerian legislator also defined it in Law 04/02 on commercial practices, where it is defined in the third paragraph of Article 03 under the title of advertising as "any advertisement aimed directly or indirectly at promoting and selling goods or services, regardless of the place or means of communication used"¹.

Law 14/04 on audiovisual activity defines electronic advertising as a designed form or a written, audio or audiovisual message broadcast for remuneration or compensation, whether to promote the provision of goods or services within the framework of a commercial, industrial, artisanal or professional activity or to ensure the commercial promotion of his enterprise²

The Algerian legislator has also defined it in paragraph (e) of Article 06 of Law 18/05 on electronic commerce as any advertisement aimed directly or indirectly at promoting the sale of goods or services through electronic communications³

It can be seen from the above that most of the previous legislative definitions have neglected to mention the main objective of electronic advertising, which is the psychological dimension of the consumer and influencing him in order to invite him to contract the advertised goods and services.⁴

Second Requirement: Characteristics and objectives of electronic advertising

Electronic advertising is characterised by a set of characteristics that we will address in the first section, and through it, the producer, supplier or promoter of goods or services seeks to achieve a set of goals and objectives, which we will address in the second section.

The first section: Characteristics of online advertising

Due to the rapid advancement of information and communication technology, electronic advertising has penetrated all spatial and temporal barriers, which makes us identify the characteristics that characterise electronic advertising, namely :

1) E-advertising relies on electronic means of communication:

It provides many techniques and services such as combining written text, image, sound and movement, as the Internet connection ensures ease and speed in

¹ Law No. 04/02 concerning the determination of the rules applicable to commercial practices of 23/06/2004, amended and supplemented, Official Gazette of 27/06/2004, No. 41.

² Law No. 14/04 on audiovisual activity of 24/02/2014, Official Gazette of 16/03/2014, No. 16.

³ Law No. 18/05 on e-commerce issued on 10 May 2018, Official Gazette issued on 16 May 2018, No. 28.

⁴ Juffali Hussein and Dalloul Tahir, alhimayia aljinayia lil mostahlik mina alichhar altijari aliliktroni ghayr almarghoub fih fi altachria aljazayri (Criminal protection of the consumer from unsolicited electronic commercial advertising in Algerian legislation), Academic Journal of Legal and Political Research, Volume II, Issue IV, Ammar Thaliji University of Laghouat, page 524.

delivering commercial advertising to the largest number of consumers, which enhances competition and provides the electronic consumer with the possibility of choosing between many goods and services remotely without the trouble of commuting¹

2) E-advertising is directed to the consumer audience:

This means directing electronic advertising messages to consumers, and this is through specialised websites that advertise only through commercial institutions and service providers of goods and services, as it is directed to the consumer audience.

3) Online advertising incentivises consumers to contract:

The aim of the electronic advertisement is to create a psychological impact on the audience receiving it in order to attract them and motivate them to contract. If this idea is absent from the advertisement, we are not talking

about advertising because the purpose of advertising is to convince consumers of the advantages of the commodity or service and the benefits it can achieve.²

Section II: Objectives of online advertising:

We will address the objectives of advertising according to its types as follows:

1) Educational advertising:

It is related to the marketing of new goods that have never existed in the market before, or old known goods that have appeared to have uses that were not known to consumers, aiming to introduce the commodity, its methods of use, its characteristics, and how to maintain it.

2) Indicative advertising:

It introduces the consumer to the commodity and guides him to its whereabouts, providing him with information that facilitates his access to it with the least effort, at any time and with the least expense, and how to satisfy his needs.

3) Competitive advertising:

¹ Aksoum Aylam Rachida, almarkaz alkanouni lil mostahlik aliliktroni The Legal Status of the E. Consumer, thesis submitted for the degree of PhD in Internal Private Law, Faculty of Law and Political Science, Mouloud Mammery University of Tizi Ouzou, 2018, page 322.

² khmikhem Mohamed, ibid , page 29

It aims to highlight the characteristics 1 commodities to urge the consumer to buy it and prefer it over others.

4) Reminder advertising:

It seeks to remind the consumer of the acquisition and use of the commodity with reference to where to obtain it in order to overcome the habit of forgetfulness inherent in the public.

5) Teaser advertising:

It comes in a form that arouses suspicion in the consumer and does not reveal itself clearly ¹

It is preceded by a question mark and remains for a while until it finally reveals itself, to be dealt with even if it is out of curiosity and curiosity.

6) Non-commodity advertising:

It aims to influence the social behaviour of the target audience to manage change and confront social issues (such as the environment, health, addiction...), and social advertising does not aim to achieve profitable or commercial goals as much as it seeks to advocate constructive social and cultural values and principles that benefit the individual and society morally.

7) Social advertising:

This is the type of advertising that aims to focus on the organisation producing the commodity rather than the commodity itself in order to build a good reputation for the organisation and thus confidence in the quality of its products, and this type of advertising is considered to be the work of the public relations department²

Research II: Nature and conditions of electronic advertising

Jurists have differed greatly in the legal nature of electronic advertising, some of them considered it as advertising, others considered it as a mere invitation to contract and others considered it as a positive, so we will address in the

¹ Fennour Basma, dirassa tahlilia lilrissala ilichharia fi alfadayiat alarabia (kanat alcharq al-Awsat mbc namothajan) – (An analytical study of the advertising message in Arab satellite TV (MBC as an example), Master's thesis in Communication and Public Relations, Faculty of Social Sciences and Humanities, Mantaouri University of Constantine, 2007/2008, page 85.)

² Talebi Fatima, alichhar aliliktroni w dawroho fi tanmiat alkhidmat alsiyahia E-advertising and its role in the development of tourism services, thesis for the degree of Master in Media and Communication, 2013/2014, Faculty of Media and Communication, Abdelhamid Ben Badis University of Mostaganem, page 11.

first requirement the legal nature of it and in the second requirement we will address the conditions that must be met in it.

First requirement: The legal nature of electronic advertising

Some legal scholars consider that the advertisement is only an invitation to negotiate as long as the advertisement comes without specifying the price and other essential elements of the contract, and therefore the advertisement is not considered a definite positive, but only an invitation to contract, which may be followed by a subsequent positive .

The proponents of this view rely on the fact that some Arab legislations have explicitly stipulated that the advertisement is merely an invitation to contract, including the Iraqi civil legislation in Article 80 and the Jordanian civil legislation in Article 40¹

Therefore, an advertisement addressed to the consumer via the Internet is not an affirmative if it does not contain all the essential elements of the contract to be entered into, as well as the prices of the goods or services offered, but rather an invitation to contract, as the virtual display of goods and services via the Internet is very similar to a real shop window².

The invitation to contract is a stage that precedes the affirmative and is distinguished from it in that its purpose is to initiate negotiations, and it is merely a stage to explore opinions in offering to sell something without specifying its price, which may end in nothing or may end in an affirmative.³

If the goods are advertised to the public with their prices, this is considered an affirmative because the merchant has disclosed his intention to sell to anyone who wishes to buy at the price offered, but if the goods are offered without a price, this is an invitation to contract ⁴which is nothing more than a means of urging the public to contract, as the distinction between the invitation to contract and the affirmative is of great importance because of the different legal implications of the two of them.

In this regard, we would like to point out that online advertising is considered a commercial act because the advertising process is carried out in the form of a

¹ Bouras Mohammed, op. cit., p. 24.

² Falah Fahad Al-Ajmi, Falah Fahad Al-Ajmi, Master's thesis submitted for the degree of Master in Private Law, Faculty of Law, Middle East University for the academic year 2011, page 65.

³ Ali Filali, *aliltizamat alnadharia alaama lil alakd* (General Theoretical Obligations of the Contract), third edition, Moufem Publishing in Algeria, 2013, page 118.

⁴ Mohamed Sabri Al Saadi, *Alwadih fi charh alkanoun almadani – alnadaria alaama lililtizamat-* (the Obvious in Explaining the Civil law - General Theory of Obligations), Dar Al-Huda for Printing, Publishing and Distribution, 2012 edition, Ain Malila, Algeria, page 104.

project and seeks to stimulate the circulation of wealth in order to market and sell goods and services and encourage the demand for them by the public.¹

We would also like to point out that there are those who consider advertising and publicity to be one and the same thing, arguing that publicity is only the maximum or extreme stage of advertising, as the advertiser does not only advertise the product or service, but also promotes it.

However, we believe, based on the opinion of some legal scholars, that there is a difference between them, as publicity leads to influencing the public's belief by using a set of emotional motives, whether to make them believe in a certain idea or belief or to dissuade them from doing so by using various means.

Propaganda has been defined as a communication process aimed at influencing public opinion and putting pressure on society with the aim of imposing certain opinions and behaviours.

It is also defined as an attempt to persuade the public of a certain point of view, and the subject of persuasion may be political, religious or economic, through mental or emotional processes² and legal jurisprudence requires the following conditions for a communication method to be considered propaganda:

1) Monopoly: That is, the entity issuing the propaganda monopolises this method of communication, and this is achieved when there is no opposition or little opposition.

2) Orientation in a specific path: This means that the propaganda means exploiting the prevailing beliefs, established attitudes and subjective behaviour by directing them in a path that serves the propaganda goal.

3) Reinforcement and trapping: It means that the advertiser uses the enemy of the medium, whether traditional or electronic, to achieve its gains and enhance them, while trapping means that the advertiser traps his audience in advertising messages by using more than one medium and in a variety of ways so that the audience becomes a reality in the advertising messages.³

In our opinion, the electronic advertisement is considered a positive, given Article 11 of Law No. 18/05 on e-commerce, in which the Algerian lawmaker explicitly stipulates that the advertisement must include all the essential elements of the good or service subject of the advertisement, which are the same conditions

¹ Batoul Sarawa Abadi, *altadhliil ilialani altijari wa atharoho ala almostahlik – dirassa mokarina* -(Commercial Advertising Misleading and its Impact on the Consumer) - A Comparative Study - First Edition, Manshurat Al-Halabi Jurists, Lebanon, 2011, page 32.

² Khemikhim Muhammad, *op. cit.*, p. 30.

³ *ibid* , page 48

that must be met in order for it to produce its legal effects, as the article states that "the electronic supplier must present the electronic commercial offer in a visible, legible and understandable manner and must include at least but not limited to the following information: ... The nature, characteristics and prices of the proposed goods or services, including all fees, the state of availability of the goods or services, the methods, expenses and time limits for delivery".

For reference, the Algerian lawmaker intended the term offer in the aforementioned article to mean publicity, as Article 30, paragraph 06 of Law 18/05 stipulates that the term offer means publicity.¹

Second Requirement: Conditions of Electronic Advertising

An electronic advertisement must fulfil a set of conditions, which we will list as follows:

First: The requirement of clarity of the electronic advertisement

The advertisement must contain sufficient information about the good or service provided that would inform the consumer and work to form a conscious will in the process of contracting, and this is required by the Algerian lawmaker in Article 30 of Law 18/05 on electronic commerce, and Article 57 of Executive Decree No. 16/222 specifying the rules imposed on each television or radio broadcasting service has stipulated that "each advertising message must be clearly distinguishable from the media, regardless of the form of props used and be preceded by an advertising navigation and presented in a way that immediately highlights its advertising character²."

French law also requires that electronic commercial operations and accompanying advertising be clear and unambiguous..., and the International Chamber of Commerce has set out in Article 11 of the International Code on the Proper Application of Advertising the obligations to be fulfilled in advertising as follows: "An advertisement must be clearly distinguishable regardless of the form or medium used, and when the advertisement is broadcast or published in the media, it must be presented in such a way that it is immediately apparent that it is an advertisement³ .

¹ Abdallah Safih and Fathi Bendjedid, 18/05 (Electronic Advertising and Consumer Protection in the Electronic Commerce Law 18/05), Journal of Legal Studies, Volume 07, Issue 02, Yahya Farsi University of Medea, Algeria, June 2021, page 794

² Decree No. 16/222 specifying the rules imposed on each television or radio broadcasting service issued on 11 August 2016, Official Gazette of 17 August 2016, No. 48.

³ Khaled Mamdouh Ibrahim, himayat almostahlik fi alaakd aliliktroni (Consumer Protection in the Electronic Contract), first edition, Dar Al-Fikr Al-Jami'a, Azarita, 2008, page 147.

Secondly: The electronic advertisement must not be misleading

Electronic commercial advertising is a manifestation of legitimate competition and a tool for informing the public about various products and services. If it is misleading and deceptive, this reflects negatively on the consumer's rights to obtain the correct information about the various goods and services advertised on the Internet and may cause harm to the consumer.

A misleading advertisement is one that is likely to deceive the consumer as it may include information that may lead the latter to fall into a mistake in an essential characteristic of the thing offered for sale, whether it is a good or service¹, and the harmed consumer who is a victim of fraud as a result of false and misleading advertisements can file a case to compensate the damage caused to him on the basis of tort liability because lying, cheating and misleading are material elements of the fraud defect stipulated in the Algerian Civil Code in Articles 86 and 87 and of course the moral element is available which is the intention to mislead and use fraudulent methods to attract the consumer to conclude the contract.

Third: The electronic advertisement must be in Arabic

This condition derives from Decree 74/70 on the Arabisation of commercial advertising, which stipulates in its first article that "commercial advertising placed and published in the national territory must be expressed in the Arabic language and allows the use of a foreign language for the same purpose, in which case the text of the commercial advertisement in the foreign language must come as a complement and be a translation of the Arabic text or a transfer of it "², and Decree 91/05 also provides in its article 19 that "advertising of all types shall be in Arabic, foreign languages may be used in addition to Arabic when necessary and with the permission of the competent authorities", and the same article states that "advertisements of all kinds shall be in Arabic". This requirement is in line with the effective protection of the consumer, whether physical or electronic³

Fourth: The advertisement must not be contrary to public order and public morals:

This condition finds its legal basis in Article 30 of Law 18/05 on e-commerce, and thus the online supplier or advertiser must take into

¹ Ben Ghida Inès, alhimaya almadania lilmostahlik fi alokoud aliliktronia (Civil protection of the consumer in electronic contracts), Memorandum for the degree of Master's degree in in-depth private law, Faculty of Law and Political Sciences, Aboubaker Belkaid University of Tlemcen, 2014/2015 academic year, page 37.

² Decree No. 74/70 on the localisation of commercial advertising, issued on 03/04/1974, Official Gazette of 1974, No. 29.

³ Djrifely Mohamed, op. cit. p. 93

account morals and ethics in the advertisement by not containing phrases, images or drawings that offend feelings, morals or even community norms, and the advertisements must be free from all forms of racial discrimination based on colour, race or gender, and must not contain elements that promote violence, etc¹.

fivth: Conditions that must be met by online suppliers

Article 30 of Law 18/05 stipulates that whoever designs an electronic advertisement for a natural person according to his or her preferences and desires must allow the latter to identify his or her identity and thus identify the person who designed the advertisement by clearly identifying the message of the advertisement to the advertised person .

According to the same article, the lawmaker also stipulated that in the case of commercial advertisements aimed at promoting a commodity or competition between several producers, the lawmaker must specify and clarify whether these advertisements are accompanied by discounts, gifts or rewards that would incentivise electronic consumers to contract.

According to Article 30 of Law 18/05, the lawmaker also requires the electronic supplier to obtain the consent of the electronic consumer before sending him direct survey messages, so that the sending supplier relies on the opt-in system. This system obliges the sender to send an electronic message to the electronic consumer requesting his consent to receive the commercial advertisements sent to him, and the latter has the right to accept or reject the receipt, and according to paragraph 01 of Article 32 of Law 18/05, the lawmaker obliged the electronic supplier to provide a system that allows the consumer to object to the sending of

electronic notices, which is known as the opt-out system and is called the rejection or objection list system.²

Conclusion:

Despite the importance that electronic advertising has become not only by traders and electronic suppliers but also by consumers because it combines speed in preparation and low financial cost in its use, this type has become a mechanism for cheating consumers through misleading, false and even unwanted advertising, and although the Algerian lawmaker Law No. 18/05 on electronic commerce by criminalising misleading and unsolicited advertising and imposing penalties on

¹ Djrifely Mohamed, op. cit. p. 97.

² Serah Khawalef, alaliyat alkanounia li himayat almostahlik aliliktroni fi kanoun altijara aliliktronia ljazayiria (Legal Mechanisms for Electronic Consumer Protection in the Algerian E-Commerce Law), Journal of Legal and Political Jurisprudence, Volume 01, Issue 01, Page 237.

persons committing this criminal conduct, we can say that misleading advertisements are constantly increasing, given the number of victims of electronic consumers, so we will make some recommendations as follows:

- 1) assigning a separate law that regulates online advertising.
- 2) creating regulatory bodies for the online advertising process.
- 3) Activating civil and criminal protection when the online supplier violates the conditions set out in Law 18/05 on e-commerce.

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laws

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3) Law N° 18/05 relating to electronic commerce issued on May 10, 2018, Official Gazette issued on May 16, 2018, No. 28.

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