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Beginning of Pre-Trial Proceedings for Economic Crimes: Order and Prevention

Inicio de las diligencias previas al juicio por delitos económicos: orden y prevención

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Dmitriy Aleksandrovich Ivanov

Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, Russia.

Email: dmitriy.a.ivanov@bk.ru

ORCID: <https://orcid.org/0000-0002-2023-3771>

Pavel Gennadievitch Sychev

Lomonosov Moscow State University, Moscow, Russia.

Email: pavel.g.sychev@bk.ru

ORCID: <https://orcid.org/0000-0001-5566-3344>

Sergey Vyacheslavovich Ermakov

Moscow University of the Ministry of Internal Affairs of Russia named by V.Ya. Kikot, Moscow, Russia.

Email: sergey.v.ermakov@inbox.ru

ORCID: <https://orcid.org/0000-0002-5164-6667>

Svetlana Vladimirovna Muradyan

Moscow University of the Ministry of Internal Affairs of Russia named by V.Ya. Kikot, Moscow, Russia.

Email: lanamuradyan@gmail.com

ORCID: <https://orcid.org/0000-0002-1366-5074>

Artem Mihailovich Silkin

Krasnodar University of the Ministry of Internal Affairs of Russia, Krasnodar, Russia.

Email: artem.m.silkin@yandex.ru

ORCID: <https://orcid.org/0000-0003-1565-5627>



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Resumen

El artículo examina la etapa de iniciación de una causa penal, prevista en los capítulos 19 y 20 del Código de Procedimiento Penal de la Federación de Rusia. Los cambios legislativos de los últimos años revelan tendencias en la diferenciación de los procesos penales en los casos de delitos en el ámbito de la actividad económica y empresarial, que, en esencia, es una extensión del componente dispositivo y restricción del principio de publicidad, es decir, la derecho de un investigador a iniciar de forma independiente un caso penal al encontrar datos suficientes sobre indicios de un delito. Otra tendencia es la ampliación de la lista de acciones investigativas a la iniciación de una causa penal, lo que pone en peligro el sistema de prueba existente y crea las condiciones previas para la violación de los derechos procesales de los participantes en un proceso judicial. Los autores proponen para la discusión la pregunta: ¿estas tendencias llevan la legislación procesal penal rusa a un modelo europeo común o un retorno a las tradiciones de la Carta de Procedimiento Penal de 1864?

Palabras clave: Iniciación de causa penal, Verificación de denuncia delictiva, Actos previos al juicio, Acciones investigativas, Investigador, Interrogador.

Abstract

The article examines the stage of initiation of a criminal case, provided for by chapters 19 and 20 of the Criminal Procedure Code of the Russian Federation. Legislative changes in recent years reveal trends in the differentiation of criminal proceedings in cases of crimes in the field of economic and entrepreneurial activity, which, in essence, is an extension of the dispositive component and restriction of the principle of publicity, that is, the right of an investigator to independently initiate a criminal case upon finding sufficient data on signs of a crime. Another trend is the expansion of the list of investigative actions to the initiation of a criminal case, which jeopardizes the existing system of evidence and creates the preconditions for the violation of the procedural rights of participants in legal proceedings. The authors propose for discussion the question: do these trends lead Russian criminal procedure legislation to a common European model or a return to the traditions of the Charter of Criminal Procedure of 1864.

Keywords: Initiation of A Criminal Case, Verification of A Crime Report, Pre-Trial Proceedings, Investigative Actions, Investigator, Interrogator.

Introduction

The relevance of the research topic is due to the need to improve the criminal procedure legislation at the present stage to resolve a number of existing problems at the stage of initiating a criminal case.

The stage of verification of a crime report is currently one of the most controversial and discussed in the domestic criminal procedural science. In this connection, it is absolutely correct to assert that the studied problem of starting pre-trial proceedings in criminal cases on economic crimes has a wide horizon for research and implementation in rule-making and law enforcement (Pushkarev et al., 2020; 2021).

Materials and Methods

As the main method in the process of writing the study, we used the general scientific systemic method of cognition, which made it possible to comprehensively consider and fully analyze the Russian and foreign experience in verifying reports of crimes.

The systematic approach method made it possible to consider the Russian and foreign experience of checking reports of crimes.

The historical and legal allowed to study the genesis and legal nature of the stage of initiating a criminal case.

The use of the comparative legal method made it possible to study in detail domestic and international legislation concerning the stage of initiating a criminal case.

The application of the methods of analysis and synthesis will reveal the existing problems in law enforcement practice when checking reports of crimes.

The formal-logical method allowed us to analyze the stage of initiation of a criminal case. As a result of the application of this methodology, we obtained new knowledge about the stage of initiation of a criminal case.

Result and discussion

The initiation of a criminal case as a pre-trial stage of the current model of Russian criminal proceedings is subject to criticism most of all. Concepts of its modification, reform, including complete abolition, appear regularly.

Legally, in the form in which this stage exists in the Russian criminal process at the present time, there is nothing similar in any other legal system. Those criminal procedural codes that were adopted in the republics of the USSR and the countries of the socialist camp during the Soviet period are in fact prototypes of the above-mentioned Code of Criminal Procedure of the RSFSR, and in no way objectively characterize the prevalence of such an institution in the modern world.

This is partly confirmed by the speed with which the former “fraternal” republics are getting rid of the Soviet legacy. A.F. Volynsky writes: “The will and desire of the legislator of this country has been demonstrated in the Criminal Procedure Code of Ukraine, using the centuries-old experience of a number of Western European countries in the fight against market crime, to oppose modern forms of crime, methods and means of combating it” (Volynsky, Volynsky, 2013, p. 24). The political component remained outside the brackets, and this is perhaps correct.

L.V. Golovko suggests “referring to the experience of Georgia, where Since October 1, 2010, a new Criminal Procedure Code has been in effect, which is essentially an elementary translation from American English (including concepts). What happened in the end? The fact that during this period was considered only a few criminal cases in the jury, and all other cases were conducted solely on the basis of “transactions with justice”. In fact, the criminal process itself was destroyed. This cannot be called anything other than an institutional catastrophe, as the American experts themselves say, with whom they had a chance to talk about the “Georgian experience” (Golovko, 2014, p. 15).

So, the Russian stage of criminal proceedings is a unique legal institution that exists only in the Russian procedural paradigm. However, this does not give any reason to raise the

question of his thoughtless exclusion from criminal proceedings, especially since on January 14, 2000, the Constitutional Court of the Russian Federation, in paragraph 4 of the Resolution on the case on checking the constitutionality of certain provisions of the RSFSR Criminal Procedure Code, regulating the court's powers in initiation of a criminal case, in connection with the complaint of citizen I.P. Smirnova and the request of the Supreme Court of the Russian Federation indicated: "In accordance with the current criminal procedure legislation, the initiation of a criminal case is an initial, independent stage of the criminal process, during which the reasons and grounds for initiating a criminal case are established, including the sufficiency of data indicating signs crimes, their legal qualifications, circumstances precluding the initiation of a criminal case, as well as measures are taken to prevent or suppress a crime, consolidate its traces, ensure the subsequent investigation and consideration of cases in accordance with the jurisdiction and jurisdiction established by law, etc".

Despite the fact that this regulation formally refers to a legislative act that has lost its force, however, since it was not contested, it can be extended without much hesitation to the current Code of Criminal Procedure of the Russian Federation.

That is, following the logic of the Constitutional Court of the Russian Federation, the stage of initiating a criminal case plays the role of a kind of "filter", which, even before the start of a full-scale preliminary investigation, which gives the right to apply the widest range of procedural measures with a repressive element, weeds out events and circumstances that obviously do not contain signs of a crime.

This conclusion is confirmed by the data of official statistics. So, in 2019, the duty units of the internal affairs bodies of the Russian Federation received 32.9 million statements (messages) about offenses and incidents (Annual progress report on the implementation and evaluation of the effectiveness of the state program "to Ensure public order and combating crime" for 2019, 2020). In 2020, only district police officers considered about 13.4 million applications and messages from citizens, which is almost 40% of all applications received by the internal affairs bodies (Annual progress report on the

implementation and evaluation of the effectiveness of the state program "to Ensure public order and combating crime" for 2020, 2021). Based on the results of checking messages in 2020, 2 million 44.2 thousand crimes were registered.

Thus, more than 30 million messages are checked annually in Russia, and this fact confirms the importance for law enforcement agencies of the existence of high-quality legal regulation of activities for checking a crime report.

In addition, there is an annual increase in crimes committed with the use of information and telecommunication technologies (hereinafter – ITT). In general, in comparison with 2012, the number of registered ITT crimes increased 50 times (2012: 10.2 thousand; 2020: 510.4 thousand). The share of registered ITT crimes among all registered criminal offenses increased to 25% (2019: 14.5%) (Annual progress report on the implementation and evaluation of the effectiveness of the state program "to Ensure public order and combating crime" for 2020, 2021).

It is obvious that criminal procedural activity in general, and not only the stage of criminal initiation, requires improvement in order to properly respond to the qualitative changes in crime caused by the spread of crimes committed on the Internet, in the field of computer information and communications.

As a result of the existence of the stage of initiation of a criminal case, unreasonable restrictions on the constitutional rights and freedoms of citizens are prevented. However, such a warning should not infringe on the principle of publicity in criminal proceedings, and a little more will be said about this below.

The uniqueness of the Russian stage of initiating a criminal case also lies in the fact that it contains elements of differentiation of criminal proceedings in cases of crimes in the field of economic and entrepreneurial activity.

In the nearest historical retrospective, these changes began with the introduction by the Federal Law No. 160-FZ (December 21, 1996) in the Code of Criminal Procedure of the

RSFSR Art. 271 “Criminal proceedings upon the application of a commercial or other organization”, which was transformed into Art. 23 of the Code of Criminal Procedure of the Russian Federation in the current edition.

Further, in 2012, the trend of expanding the category of criminal cases of private-public prosecution at the expense of "entrepreneurial crimes" became another step towards deepening the differentiation of proceedings in cases of crimes in the field of economic and entrepreneurial activity. Federal Law No. 207-FZ (November 29, 2012) amended part three of Art. 20 of the Code of Criminal Procedure, according to which cases of crimes provided for in Articles 159-1596, 160, 165 of the Criminal Code are classified as criminal cases of private-public prosecution, if they are committed an individual entrepreneur in connection with his entrepreneurial activity and (or) the management of property belonging to him, used for the purpose of entrepreneurial activity, or if these crimes were committed by a member of the management body of a commercial organization in connection with the exercise of his powers to manage the organization or in connection with the exercise of a commercial organization entrepreneurial or other economic activity, except in cases where a crime has caused harm to the interests of a state or municipal enterprise, a state corporation, a state company, a commercial organization with direct participation in the authorized (joint) capital (share fund) of the state or municipal formation, or if the subject of the crime was state or municipal property.

In 2011, Art. 140 of the Code of Criminal Procedure of the Russian Federation introduced an exceptional reason for initiating a criminal case on a tax crime (part 11), which began to serve only those materials that were sent by the tax authorities to resolve the issue of initiating a criminal case. In 2014, this provision became invalid. In the same year, a similar norm was introduced into the RF Criminal Procedure Code – part 12 of Art. 140, according to which the grounds for initiating a criminal case on crimes under Art. 1721 of the Criminal Code of the Russian Federation were only materials sent by the Central Bank of the Russian Federation (or the bankruptcy commissioner) to resolve the issue of initiation of a criminal case. This rule also became invalid in 2018 (Khimicheva, Sharov, 2016, p. 395-406).

Instead of part 11 of Art. 140 of the RF Criminal Procedure Code, Art. 44 of the RF Criminal Procedure Code has been supplemented with parts seven through nine, which established a new procedure for checking reports on tax crimes, providing for interaction with the tax authority. Also introduced were part 41 of Art. 148 of the Criminal Procedure Code of the Russian Federation on sending a copy of the decree on refusal to initiate a criminal case to the tax authority (later the territorial body of the insurer was added there) and the second paragraph of the second part of the second Art. 213 of the Criminal Procedure Code of the Russian Federation on sending to these organizations the decision to terminate the criminal case.

Changes in the procedure for verifying a report of a crime in the field of economic and entrepreneurial activity each time were an expansion of the dispositive component and, as a consequence, a restriction of the degree of publicity, that is, the right of the investigator to independently initiate criminal proceedings upon establishing sufficient data indicating signs of a crime.

Each time this caused negative responses from both practitioners and theorists.

D.P. Chekulaev noted on this occasion: “Special reasons for initiating a criminal case are the “invention” of a newer law. For the first time in the history of Russian criminal proceedings, such a pretext was provided for initiating a criminal case on crimes under Art. 198 – 1992 of the Criminal Code of the Russian Federation. <...> This change in the traditional approaches to the initiation of a criminal case on the crime of public accusation was associated with the “fashionable” opinion of a number of top leaders of our state at the turn of the 2010s the ruling on the need to restrict the ability of law enforcement agencies to arbitrarily influence business processes through the use of criminal repression” (Golovko, (2016, p. 595-596).

M. Parfenova and E. Velikaya (2013) noted: “According to various estimates, at present, from 60% to 70% of crimes committed in this area remain undetected. Previously, the overwhelming majority of such crimes (about 85%) were detected by the internal affairs

bodies. <...> With the adoption of the Federal Law of December 6, 2011 No. 407-FZ, the internal affairs bodies were actually barred from identifying tax crimes”.

Part 12 of Art. 140 of the Code of Criminal Procedure of the Russian Federation was subjected to no less harsh criticism. So, D.P. Chekulaev pointed out that “the decision to initiate a criminal case depends on the opinion of the Bank of Russia or the bankruptcy managing credit institution. Once again, the body (official), whose powers do not include the detection of a crime, is vested with the exclusive right to initiate criminal procedural activities, and the investigator implements the obligation to initiate a criminal case upon detection signs of a crime only in the case of receipt of a message about a crime from a special source. The presence of any “monopoly” reason for initiating a criminal case excludes not only the possibility of using the results of operational-search activity at this stage, but also the identification of latent crimes (in accordance with the sphere) specially created for this purpose – the organs of inquiry. It seems that the introduction of special reasons for initiating a criminal case does not comply with the principle of the publicity of the criminal procedure (Part 2 of Art. 21 of the Criminal Procedure Code of the Russian Federation), is erroneous in the direction of the rule of law. the stage of initiation of a criminal case” (Golovko, 2016, p. 597).

Z.I. Brizhak and V.G. Statsenko shared this point of view: “In fact, the new norm establishing a strict dependence of the decisions of officials conducting criminal proceedings on the decisions of the Central Bank of the Russian Federation, as well as the bankruptcy administrator (liquidator) of a financial organization, encroaches on the principle of publicity of criminal proceedings. The preliminary investigation bodies are deprived of the opportunity to fulfill the provisions of Part 2 of Art. 21 of the Code of Criminal Procedure of the Russian Federation, the obligation in each case of detection of signs of a crime to take measures provided for by the Code of Criminal Procedure of the Russian Federation to establish the event of a crime, to expose the person or persons guilty of committing a crime” (Brizhak, Statsenko, 2014, p. 19).

An unreasonable violation of the balance of publicity and discretion every time affects the effectiveness of the performance of the state function of criminal prosecution. And it is encouraging that the legislator has not yet completely lost the ability to listen to the practical needs of the state in terms of combating economic (as well as other) crime, as evidenced by the abolition of Parts 11 and 12 of Art. 140 of the Code of Criminal Procedure of the Russian Federation.

Currently, the legislator has added special exceptions to the unified structure of four reasons and grounds for initiating a criminal case. Federal Laws of December 27, 2019 No. 498-FZ, 05.04.2021 No. 67-FZ, the technique of “point regulation” was applied for special cases arising at the stage of initiating a criminal case, this time, using a ban as a method of legal regulation. It has been established that a special declaration on assets and bank accounts (Part 3 of Art. 140 of the Code of Criminal Procedure of the Russian Federation) cannot be a reason for initiating a criminal case, and also cannot be the basis for initiating a criminal case only the fact of a person being intoxicated (Part 4 of Art. 140 of the Criminal Procedure Code of the Russian Federation). It is obvious that such regulation of the stage of initiation of a criminal case cannot be considered systemic.

Another of the most alarming trends that has been growing recently is the growth in the number of verification actions that authorized officials can carry out when considering a crime report, and at the same time, the list of investigative actions allowed before a criminal case is opened is also growing.

On March 4, 2013, the production of forensic examinations was included in this list. Part 11 was also added to Art. 144 of the Code of Criminal Procedure that the persons participating in procedural actions when checking a crime report are explained their rights and obligations, including the right not to testify against oneself, one's spouse and other close relatives. , use the services of a lawyer, as well as bring complaints about the actions (inaction) and decisions of the inquiry officer, the body of inquiry, the investigator, the head of the investigative body in the manner prescribed by Chapter 16 of this Code. Participants in the verification of a crime report may be warned about non-disclosure of data from pre-

trial proceedings in accordance with the procedure established by Art. 161 of the CCP, and, if necessary, the safety of a participant in pre-trial proceedings is ensured in accordance with the procedure established by Part nine of Art. 166 of the CCP, which was previously applied to witnesses, victims of their relatives and close persons.

In addition, in accordance with Part 12 added to the same article, information obtained during the verification of a crime report can be used as evidence, subject to the provisions of Art. 75 and 89 of the Code of Criminal Procedure of the Russian Federation. If, after the initiation of a criminal case, the defense or the victim files a petition for an additional or repeated forensic examination, then such a petition must be satisfied without fail.

Negative assessments of the entire stated innovation are numerous and unanimous. In particular, O.V. Khimichev and D.V. Sharov note that “the tendency observed recently to constantly expand the scope of the so-called pre-investigation verification at the stage of initiating a criminal case, eroding the foundations of the existing theory of evidence regarding the very concept of evidence and the methods of collecting them” (Khimicheva, Sharov, 2016, p. 77).

In turn, O.V. Michurina believes that “by allowing the production of all investigative actions before the initiation of a criminal case, we will lose the main purpose for which this stage was created, the boundaries of distinction with the subsequent stages of criminal proceedings, namely preliminary investigation, will be erased” (Michurina, 2019, p. 58).

L.V. Brusnitsyn pointed out with regard to this aspect that “the legislator admitted an obvious discrepancy between a rather narrow task to be solved at the stage of initiating a criminal case and an unnecessarily wide range of procedural means of solving it. Note also: if the legislator really takes the above steps, the border between criminal procedural activity before and after the initiation of a criminal case, in fact, will be erased. But in this case, is the stage of the IUD itself necessary, in other words: what is the meaning of the decision to initiate a case after the preliminary investigation has actually begun?” (Brusnitsyn, 2015, p. 159).

One cannot but agree with the opinions expressed regarding the problem of blurring the boundaries between the pre-investigation check and the preliminary investigation, but one cannot agree with the fact that at the stage of initiating a criminal case, a “narrow task” is being solved. Note that the significance of the stage of initiation of a criminal case consists not only in the “filter” that separates criminal behavior from other events and facts, but also in the event of a criminal case against a specific person, this person is given the status of a suspect in accordance with Art. 46 of the Code of Criminal Procedure of the Russian Federation.

It is quite obvious, according to a number of scientists (Popenkov, Ivanov, Khoryakov and Poselskaya, 2021), that this decision should be well-founded, motivated, supported by objective data obtained during the verification of the crime report.

In the event of an erroneous decision to initiate a criminal case and not confirming suspicions during the preliminary investigation, the criminal case must be terminated, including on rehabilitating grounds (absence of an event, absence of corpus delicti and other grounds), and the person must be rehabilitated. This situation is assessed negatively in departmental statistics and is taken into account when assessing the results of the activities of the preliminary investigation bodies.

In order to improve the quality of decisions to initiate a criminal case, there are objective needs for the law enforcement officer to expand the rights to carry out investigative actions when checking reports of crimes.

In the above-mentioned work of L.V. Golovko “Archetypes of pre-trial proceedings, possible prospects for the development of the domestic preliminary investigation” (Golovko, 2016, p. 15), which is of absolute value for legal comparative studies, three systems of organizing criminal proceedings are identified as follows:

1. “French system” – an initial police inquiry aimed at finding evidence, identifying the person who committed a crime, conducted under the guidance of a prosecutor, within

which authorized persons have the right to carry out all investigative actions necessary to obtain evidence of a person's guilt in committing a crime, to detain not only suspects in the commission of a crime, but even victims and witnesses, if it is necessary "to provide them with information about the crime".

2. The "German system", in which there is no stage of verification of the crime report, and the criminal proceedings themselves begin with a police inquiry, the prosecutor manages all proceedings in the case, who, if a guilty person is found, issues an indictment and sends the criminal case to court.

3. "American system", a feature of which is the lack of clear rules for police investigation. In the process of pre-trial proceedings, the police have as their main goal the search for a person who has committed a crime, the results obtained are not recorded, and in general, the absence of prosecutorial supervision over the activities of the police is characteristic.

When deciding which development path to take for the Russian legislator, of course, it is necessary to be guided by the existing law enforcement system, to avoid as much as possible the costs inherent in any reform, to preserve the existing positive.

By allowing the production of procedural actions at the stage of initiating a criminal case, the Russian legislator brought it at least one step closer to the so-called "common European" model.

Having allowed the possibility of obtaining evidence before initiating a criminal case, the legislator thereby touched upon the fundamental problems of the theory of evidence, the criminal procedure form, and the observance of the rights of participants in criminal proceedings.

We believe that the performance of certain investigative actions at the stage of verification of reports of crimes can help to save the forces and resources of the preliminary investigation bodies. Also, to minimize the duplication of cognitive activity to establish the event of a crime, the amount of harm caused (Nguyen et al., 2021, p. 211-220) and other circumstances subject to proof, initially carried out by the person checking the message, and subsequently by the investigator (interrogator) in the initiated criminal case. A similar idea of procedural economy has been implemented in proving a criminal case investigated

in an abbreviated form of inquiry (Art. 226.5 of the Code of Criminal Procedure of the Russian Federation).

It should be noted that the Charter of Criminal Procedure of the Russian Empire in 1864 (hereinafter – the Charter) also provided for the stage of police verification. In the department of the first chapter of the first “The participation of the police in the preliminary investigation”, this procedure was called an inquiry. In particular, Art. 252 of the Charter read: “When neither the investigator, nor the prosecutor or his comrade is present, the police, informing them of an incident containing signs of a criminal act, at the same time makes a proper inquiry about it”. Art. 253 of the Charter fully reflects the purpose of this inquiry: “When the signs of a crime or misconduct are doubtful, or when an incident with such signs is reported to the police by rumor (popular rumor), or generally from a source that is not entirely reliable, then in any case, before reporting on belonging, she must make sure through the inquiry: whether the incident really happened and whether it contains signs of a crime or misconduct”. As you can see, its goals are similar to those of verifying a crime report at the current stage of the initiation of a criminal case” (Mordukhai-Boltovsky, 1892, p. 410).

Perhaps the Russian legislator, unaware of it and submitting to the inexorable historical logic of the cyclical development of any legal system, began a long journey of transforming the stage of criminal proceedings into a police inquiry of a continental type, or, if you like, a return to the pre-investigation procedure of the Charter of Criminal Procedure of 1864. not the reckless destruction of Soviet procedural canons, leading to disastrous consequences (as happened in Georgia or Ukraine). This cannot but entail a revision of the canons of evidence, which is painful for the doctrine of criminal procedural law. Whether the “game is worth the candle” will be decided over time.

A balanced and thoughtful approach is important here, which should take into account the practical needs of justice, and the theoretical achievements of legal sciences, and foreign experience, and the uniqueness of the Russian path of development. The latter are especially dear to our politicians, who once again had to decide the fate of Russia.

Conclusion

An analysis of the current trends in changing the stage of initiation of a criminal case in Russian criminal proceedings shows that there are ambiguous processes, point changes, and not a systemic regulation of the stage as a whole, assessed negatively by most of the legal scholars.

Refusal from this stage in the Soviet version will not bring a positive result, as evidenced by the experience of Georgia, Ukraine and other independent states that were previously part of the USSR and are now trying to urgently switch to legal systems of the European or American model.

However, preservation in its former form already gives a tangible effect of “stalling” law enforcement practice, and in the conditions of the annual growth of registered appeals from citizens, it entails an irrational use of the forces and means of law enforcement agencies. The measures taken by the legislator did not give a positive result.

Reforming the stage of initiating a criminal case requires a balanced and thoughtful approach, the use of the historical experience of Russia, as well as the modern practice of European countries.

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