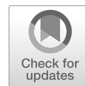
Antitrust, Mergers, State Aid and Consumer Protection Under the Same Roof: Does Political Compromise Prevail over the Expert Approach?



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1 Introduction

This contribution discusses complementarities and tensions between competition policies and consumer protection policies, with the occasional reasonably critical view on various ideas on organising different policies, such as competition (antitrust and merger control), state aid, and consumer protection, under the same roof. The focal point of the organization of any authority should be to reach the best possible result, which could be identified as efficient implementation for the sake of public interest, using necessary but not excessive funds. This contribution will try to briefly elaborate on different models, specific advantages of the authorities that are in charge on one or more policies, with specific regard to either functional independence and real autonomy, or political influence that may affect the level of expertise in the authorities being exposed to political pressure. The contribution has no intention to suggest or propose one model of institutional organization or another; the aim of this contribution is to identify different challenges as seen by the author, based on relevant practical experience in different jurisdictions.

Establishing an efficient organizational system for each authority, especially the ones that may be described as reasonably new, such as the authorities in charge of competition law and policy, state aid control and consumer policy, should be the basic goal of every country, for the sake of political and economic stability, national competitiveness, economic growth, and the benefit of the citizens. A functioning market economy cannot exist without efficient competition. A transparent,

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user-friendly and non-discriminatory legal framework, credible institutions and implementation, represent the basic preconditions for an efficient competition (Bellamy and Roth 2001; Bishop and Walker 2007; Faull and Nikpay 2014). Bearing in mind the Treaty of Rome, it can be observed that the main principles of competition and the substantial provisions that identify competition philosophy and competition protection have remained unchanged. The list of "famous" five articles, i.e. stipulations regarding national monopolies of a commercial character, restrictive agreements, abuse of a dominant position, granted special and exclusive rights and state aid, covering the broad field of competition, has changed several time times, but the substantial stipulations have remained unchanged. Almost all jurisdictions around the world have included provisions similar to the ones previously mentioned; in the broader European area substantial provisions equivalent to the EU competition *acquis* can be found in all jurisdictions. This provides for transparency and legal predictability, especially when the competition authorities publish their decisions.

Regarding the task of publishing decisions, it is worth noting that the enforcement records of the competition authority reveal its orientation, priorities and enforcement abilities. The greater the number of antitrust cases that are handled, the more competent the competition authority is considered to be, by the professional society, international partners and the stakeholders whose interest it is efficient competition in the market. If the enforcement record consists to a high extent or almost exclusively of merger control, it can be considered that the priority is not to the fight against cartels and abuses of dominance.

Merger control is of course not something that is not necessary, nonetheless its importance is sometimes overestimated and focusing on potential competition harm, in form of mergers, may be wrong, especially when the fight against traditional breaching of competition, e.g. cartels and abuses of dominant position, are not given proper importance. It can be understood, although not supported, that (especially) in the case of small competition authorities human and financial resources are limited and such authorities do not have at their disposal sufficient resources to tackle demanding antitrust cases, which need to be analysed using sophisticated techniques, and had to deal with strong economic and legal teams of the companies under investigation, whereas in merger control the companies involved are very keen to provide all the necessary data in order to have the merger cleared in a short time. Although merger control also provides for introduction of economic analysis, relevant market definition, and potential harm estimation, that is not enough; the basic goal of competition protection is detection of infringements and that is not an easy task. Special know-how is an absolute must, including special knowledge of investigative techniques, using specific economic and econometric analyses, IT forensics, etc.

Institutional capacities represent an important element for the implementation, either in form of the competition law enforcement or in the form of competition advocacy, which represents an important although sometimes overlooked element of a higher level of competition culture.

2 Institutional Capacities

Although the competition authorities should be granted the sole competence for competition protection, there are other institutions that have a very significant role in providing the conditions for efficient competition in the market. Sector regulators, which have a significant role in providing conditions for competition for the market and in the market, are sometimes not exposed to critical analysis regarding their positive (and sometimes negative) impact on competition efficiency. In some industries (sectors), especially those that are either dependent on infrastructure or have only recently been open to competition and/or privatization, the competitive pressure may not be as strong as in the markets that have been open to competition for years.

The situation in (especially) infrastructural sectors, as well as in sectors or markets where state monopolies of a commercial character exist(ed), and/or exclusive and special rights are granted, can be considered not in favour of efficient competition and competitive market economy. It is very important to identify the rules of the game in the market and the potential obstacles for efficient competition, and then decide what institutional capacities, either general or specialised, are needed to provide the conditions that are necessary for a competitive market.

The first element is to have a transparent and non-discriminatory legal framework that provides for level playing field. Regarding the legal framework, sometimes a basic mistake may occur when considering that competition framework in the narrow sense (i.e. antitrust, merger control and state aid) is enough.

Sector legislation (especially, although not exclusively in the sectors dependent on infrastructure, financial services, etc.) represents an important element for either opening the relevant markets to competition or preventing such markets from having competition. One of the important elements of such legislation is to precisely determine the scope and level of authority as well as accountability of the sector regulators, in order to provide the necessary elements for efficient regulation, on one hand, and not to allow a selective negative approach by regulators, on the other.

Providing the sector regulators with some sort of authority with regard to competition control means a specific advantage of these sectors, compared to other sectors.

In some countries, such as Italy, Croatia, Serbia, etc., in the past the central banks had the competence over competition control in these countries; to a certain extent, especially regarding fines, sectors such as banking were in a more favourable situation than other sectors. A typical example for such differentiated approach can be seen in Serbia, where the central bank could impose much lower fines than the competition commission for the same kind of infringement. Having in mind the *ne bis in idem* rule, the banks and insurance companies may wish to be fined by the central bank and not by the competition commission.

It is very important to take into account that a development of a specific sector and/or specific company should not be identified as a public interest; the development of the national economy and its competitiveness should always be identified as a public interest and international competitiveness of a "national champion" cannot

be an excuse for a non-competitive environment in the domestic market. Nonetheless, incumbents have a historically privileged position in the market, and all institutions, i.e. sector regulators, competition authorities and the courts, should pay a special attention in this regard.

Although economy of scale and scope is a very important issue, the creation and support of "national champions", referring to international competitiveness of such undertakings and economy of scale and scope, cannot be an excuse for monopolization of a domestic market or for the privileged treatment of "national champions".

When talking about competition and its protection, special attention should be given to the courts and the scope of their authority. Judicial review in competition cases is a very important element for two reasons—it provides a very clear indication of whether the decisions of the competition authorities on merits and sanctions are correct, and with transparency it provides for legal predictability); therefore, it may create an incentive for effective leniency program, of course provided that the competition authorities issue rulings with rigorous fines, having deterrent effect. Transparency of enforcement, in the form of publication of non-confidential versions of decisions, is a must for both competition authorities as well as the courts. Such transparency provides for very clear understanding of the authority's policies, as well as a kind of a guideline how to define relevant markets, how to apply different instruments of competition law, like leniency, direct settlement, commitments, etc.

In addition to judicial review, the courts have another, very important, role in the competition law enforcement. Private enforcement is an efficient model that undertakings suffering damages from competition infringements may choose however in the EU, save the UK, the cases of private enforcement are still quite rare. There are different reasons for such a situation: on one hand, awareness of all the possibilities that competition law provides is still at a low level and the courts in some jurisdictions are still not providing the quality of decisions that is desired and absolutely necessary. This might be because competition law was fully introduced in many jurisdictions in early 1990s and that the courts, if not specialised, such as the European Court of Justice and the Competition Appeal Tribunal in the UK, still require time to get familiar with the very specific infringements that cause significant economic harm. Legalistic approach is neither an advantage nor the future development that would lead to efficient judicial review, nor to a more active approach of both undertakings in the market and the courts. It is still necessary to raise public awareness about the benefits of competition law and policy, and especially about credible institutions, on a daily basis, and this applies to all institutions: competition authorities, sector regulators, and the courts. In some jurisdictions, especially in the Western Balkans, administrative courts are given the competence for the judicial review in competition cases. This is possible due to a wrong understanding that competition authorities are administrative bodies and that the administrative court judges are properly qualified for such review. The question whether such understanding is the best possible one remains open. Nevertheless it should be pointed out that judicial review should be much more focused on the merits, on type of infringements and economic harm, and not on potential procedural mistakes (almost exclusively).

Competition authorities are *sui generis* institutions, much more “quasi courts” than administrative bodies. In administrative disputes, the administrative bodies pass down decisions regarding the rights of the parties; in antitrust judicial reviews the courts pass either decisions on the merits or decisions on procedural mistakes, nevertheless the challenged decisions of the competition authorities are always based on infringements for which the parties may be accountable. The decisions of the competition authorities on the merits are therefore not decisions about the rights of the parties, on the contrary, the decisions are based on infringements; more precisely—the competition authorities do not decide about the rights of the parties, they are entitled to bring decisions if the parties break the law. Another important element that may cast doubts on the competence of the administrative courts in cases of judicial review of competition the authority’s decisions is the competence of the competition authorities to impose fines; such decisions, based on the decisions on merits, are not administrative decisions at all.

An additional reason the administrative courts are not the best placed institutions for judicial reviews in competition cases can be found in the level of fines that are as per rule set at up to 10% of the annual turnover, which exceeds the level of fines that are prescribed in specialised laws regarding criminal liability of legal persons. Typical proof for such a statement can be found in the Menarini judgment in which the court upheld the decision of the relevant competition authority (Autorità Garante della Concorrenza e del Mercato, the Italian competition authority). The court found that the fine, which exceeded the level of fine as stipulated by the relevant criminal code for such infringements, was based on procedure in which the procedural standards, and thus the rights of the party against which the procedure was initiated, are significantly lower than in criminal procedure. The European Court of Human Rights then held that it was not incompatible with the European Convention on Human Rights for the sanction to be imposed initially by an administrative authority, provided that the decision was subject to control by a court having full jurisdiction.

3 Competition Authorities: What Should They Protect

As previously mentioned, competition law and policy is quite a new category in all SEE jurisdictions. Following early understandings of how markets work, especially bearing in mind Lex Mercatoria and Adam Smith with the recognition of potential anticompetitive behaviour, the first institution, the U.S. Federal Trade Commission, was established in 1914, and the Treaty of Rome, which introduced the five competition rules, was signed 60 years ago, on 25 March 1957. Bearing in mind these facts, it is no surprise that there are still some misunderstandings of competition rules.

There is a wrong understanding that consumers should be protected under competition law, although the incumbent Competition Commissioner Margrethe Vestager correctly emphasised that “competition is a consumer issue” at BEUC General Assembly, on 13 May 2016 (Vestager 2016). Former Competition Commissioner Mario Monti pointed out that “consumers in Europe expect, need and

deserve a strong and ambitious competition policy" at the International Cartel Conference in Berlin in 2001, however it should not be understood that the competition law and policy exist for the sake of consumer's benefit only, usually identified as better choice and better price/quality ratio (Monti 2001). Competition policy should be understood as the vision that consumer benefits should also be taken into account. It is evident that consumers are not directly protected by competition law and policy. Consumers benefit from efficient competition, which is achieved by efficient competition law and policy; nevertheless, they are legally protected under the comprehensive general civil legal framework. It is even remains unknown to what extent the consumers need a specific law on consumer protection, if they are properly protected by the general, non-specific legal framework. Much more importantly, consumers are properly informed about their rights, about the possibilities that the general legal framework provides. If consumers are properly informed, then it can be expected that they will not be regarded as average consumers, exposed to consumer fraud, etc., but as reasonable consumers, knowing their rights and able to protect them. Regarding the effects that competition law and policy may have on consumer benefits, it is undisputed that consumers will benefit if competition authorities, sector regulators and courts are able to perform efficient enforcement. If consumers need a specific legal framework with regard to competition law and policy, it is worth considering introducing (if it has not been introduced already) possibilities of class actions (collective redress) in private enforcement of the competition law; such introduction would provide consumers with better chances to recover damages from possible competition infringements (Kroes 2009).

Another common misapprehension is that competition law and policy should protect the competitors. Again, competition law and policy cannot protect one or more competitors in the market; competitors/undertakings should have the best conditions in the market and enjoy full support of their business activities when the proper conditions are fulfilled: having a transparent and non-discriminatory legal framework that provides a level playing field and institutions that perform efficient enforcement. Both dilemmas regarding consumer benefits (and not protection) and the competitors' lawful interests were addressed by former Competition Commissioner Mario Monti in his prominent remark that the European Commission and all national competition authorities should perform "consumer oriented competition policy" and that all jurisdictions should provide is a level playing field for all market participants (Monti 2004). Efficient competition should be protected by competition law and policy, which should be achieved by fighting cartels and abuses of dominance, and by prohibiting mergers that would significantly impede effective competition.

4 How Should Competition Authorities Be Organised?

There is no "one size fits all" rule. Competition authorities and other institutions, as authorities that are in charge of antitrust, merger control, state aid (monitoring), sector regulation, consumer policy, trade defence instruments, etc., clearly identified

as guardians of public interest, may be organised in different ways according to size and development, both economic and institutional, depending on the jurisdictions concerned. There are no detailed rules on how the institutions should be organised; nevertheless, there is a very simple rule that should always be respected—all institutions should be granted functional independence and should in no way be exposed to political influence.[1]

There are different conditions for providing functional independence; however, two of them are inevitable for supplying this kind of independence and thus a reasonable level of autonomy. First, the authority should have the competence to issue final decisions, subject to judicial review only. Any kind of administrative review significantly jeopardises functional independence. Second, the authority should have the right to decide on the necessary financial and human resources on its own. Limiting resources directly affects the enforcement record and the level of expertise.

This is more easily said, even stipulated in the legal framework, than provided in practice. The judiciary has a specific position and is not subject to the comments regarding autonomy and independence in this paper.

As for other institutions, such as competition authorities and sector regulators, the question of independence and accountability remains a special challenge to be discussed. Most of competition authorities are formally independent, their administration appointed in different ways, either by parliament, executive government, president, etc., for a specific, mostly renewable period of time. In competition law, the conditions for extraordinary dismissal are quite similar and in line with the general legal system(s), nevertheless there are different ways of how to violate the spirit of the regulation and abuse the extraordinary dismissal instrument. One of the models is to amend competition law for some other reasons, e.g. more precise elaboration of procedural rules, alignment with the EU *acquis* or including provisions that would *prima facie* appear as constructive upgrading of the current legal system. If in such cases the transitional provisions do not provide for the current administration of the respective authority to retain the current term of office until the end of the given mandate, then it is obvious that such a model represents a typical political influence on appointments.

A more sophisticated model of negatively influencing the independence of the institutions is the limitation of financial resources. If the authorities are not provided sufficient financial resources, they cannot afford to recruit and train the experts that are absolutely necessary for efficient enforcement.

The staff of competition authorities and sector regulators can provide their service at a high professional level only when such experts are properly trained and motivated.

[1]Indeed, as it stems from the Communication (Commission 2014) and Working Documents (Commission 2014a, b) adopted on the occasion of the tenth anniversary of the Regulation 1/2003, the European Commission does not provide clear guidance to the Member States on the issue of competition authority organisation.

(De)motivating such experts, who must have specific interdisciplinary knowledge, by equalising them with administrators that are engaged in "classic" administrative tasks, is the perfect way for high staff turnover, thus weakening the institutions. If the human resources are lacking, then the enforcement records are hardly credible and we can ask ourselves whether the philosophy of the EU Competition Commissioners can actually be implemented in practice. In small jurisdictions and in jurisdictions that have only recently initiated sound competition law and policy, the challenge of recruiting, training and especially retaining experts, who are scarce, is high and sometimes also not in the interest of partisan politics and political horse trading.

If there is a proper political consensus, the competition institutions should be provided with sufficient financial resources in order to provide credible enforcement and sound competition advocacy. Competition advocacy is very important as it provides relevant information to the authorities on how to ensure conditions for competitive market, a level playing field, and how to prevent state (government) induced competition distortions. In small jurisdictions and ones that had only recently introduced market economy and competition law and policy, competition advocacy is very desirable. It should be aimed at all relevant stakeholders, lawmakers or those who have executive powers for legal implementation. It should also provide awareness raising activities in order to raise the level of competition (and general legal) culture. A brief overview of the enforcement records of the competition authority can show whether an authority has set the proper priorities and/or whether it possesses sufficient human and financial resources.

Another challenge, especially in EU candidate countries, is what competence competition authorities should be granted. Should such authorities have the competence for antitrust and merger control only; should they also be in charge of state aid monitoring; should they also focus on consumer protection; should all sector regulators be merged into one institution, etc.

5 Antitrust, State Aid and Consumer Protection Under One Roof

Following the model of the DG Competition of the European Commission, the authorities in certain jurisdictions, especially in some current candidate countries, have been granted jurisdiction over antitrust, merger control and state aid control. The question is whether such a model is good. There are some reasons *pro* and *contra* such model, as is the case for different models available.

European Commission is the guardian of the internal market, without any borders, (however some limits, especially with regard to free movement of labour force, still exist), level playing field, common trade and competition policy, etc. It is logical and inevitable that the EU has monopoly over state aid control, otherwise the conditions in the internal market would be distorted as it cannot be expected that

all member states will provide the same standards regarding state aid, for different reasons: political stability, social compromises, and (potentially) better results in elections at the state and local level.

Of course, the EU member states are not prohibited to provide state aid, however this must be done according to the rules and under strict control of the EC (DG Competition).

EU member states do have the right to design and implement their state aid policy, although with the burden of responsibility, even though there is a feeling that the state aid grantors sometimes do not really care, or do not have enough related knowledge, for a transparent, non-discriminatory state aid policy, with all the potential negative consequences.

The authorities, state aid grantors, should bear in mind that the undertakings that have been granted unlawful state aid, should recover such aid or go bankrupt (e.g. British Aerospace and/or Rover). The grantors are also especially accountable to the citizens, since as taxpayers they contribute to the budget, and the unlawfully dispensed state aid funds should be used properly, for the common good.

To provide common, transparent, and efficient state aid policy and its control, the authority is given exclusively to the European Commission, in order to avoid conflict of interests and political economy pitfalls. The question is whether the national competition authorities are the best placed authorities for the control of state aid.

It should also be noted that specific challenges regarding human and financial resources appear already when competition authorities implement their tasks in the domain of antitrust and merger control, when the parties in the procedures are undertakings that are active in the market, and not state authorities. Can we imagine what would happen (in the context of available human and financial resources) if the competition authority were to constantly warn the "master" of their financial (and subsequently human) resources of what is proper and what is not.[2]

Competition authorities should provide expert view of competition distortion, without any political influence. Deciding about competition infringements and related fines is strictly an expert decision. Deciding about mergers should also be strictly an expert decision, which should not be exposed to any political influence. If the undertakings concerned are not happy with the decision and if they feel that their rights were violated, judicial review is always a possibility. If the competition authority has erred, the courts can pass a decision that will recover (potential) damages of the undertaking(s) concerned.

Even in Germany, where the Federal Minister of Economy can challenge the decision (prohibition of a merger) of the Bundeskartellamt (German Federal Cartel Office), this can be done only through court procedure, on the basis of proven public interest (a very limited choice of economic and social policy elements) and it is in no

[2]The very sensitive question of state-aid induced distortions of competition is not elaborated in this specific contribution, however, non-transparent and unlawful state aid policy is in fact a state-induced distortion of competition.

way a "classic" case of over-ruling. Spain has followed the same model for competition law since 2007.

The situation with state aid monitoring is a bit more complicated. The monitoring institution has to be the guardian of the state aid rules and has to have the power to inform the state aid grantors how to design and implement the state aid policy, and also should have the power not just to inform, but also to block the decisions of the state on different levels. This kind of decision has a political dimension and if state aid monitoring and "classic competition" are organised under the same authority, the question remains open whether political influence, based on different interests related to state aid policy, extends also to antitrust and merger control enforcement.

Decisions in antitrust cases are primarily expert decisions; the influence of politics is rare and usually does not represent a major influence on decisions. It is presumed that a bit more political influence appears in cases of merger control, however it is unclear how strict merger control should be, having in mind the dynamics of the markets, especially in economies in transition, having only recently opened their borders.

However, state aid policy and implementation (granting, monitoring, evaluation, recovery) represent a specific challenge. It is always in focus of daily politics for different reasons; buying social peace, ensuring better starting positions for elections at state and local levels, using public funds for separate (sometimes strictly individual) interests represent very specific challenges and obstacles for a sound, transparent and non-discriminatory approach.

Regarding state aid policy and implementation, as well as control, political interests and influence are constantly present, sometimes less intensively, sometimes with direct influence on specific decisions.

Political influence regarding state aid is most likely unavoidable. Giving antitrust (and merger control) to the same authority with the state aid control may lead to political influence and also have a spill-over effect on expert decisions in antitrust and merger controls fields.

There is another issue that should be mentioned. The exclusive authority over state aid control in the European Union is granted to DG Competition. The EU member states therefore do not have any decisive (control) power.

In the case of candidate countries, it is convenient to have separate authorities, as one (antitrust and merger control) will continue operation also after EU accession, whereas the other (state aid control) will have to be reorganised as a contact point only.

It was already mentioned what kind of data collection problems competition authorities encounter in antitrust cases. The competition authorities request data, and may even impose procedural fines if the data are not submitted on time, however ministries have the best overview of the relevant data, overseeing either granting the aid and/or financial transfers, and the ministry responsible for finance.

The idea of having an inter-ministerial commission for state aid control is perhaps a much better idea than to incorporate state-aid monitoring into the competition

authorities, for at least three reasons: (1) such a commission would include representatives from different sectors (state aid grantors) and other institutions whose interest should be transparent state aid policy (having influence over market structure, competition, and macroeconomic policy), as well as the ministry in charge of finance, where all relevant data is controlled; (2) such a commission should have only administrative support from the ministry responsible for finance, which should not have dominant influence; and (3) the decisions of the commission could be subject to a “gold anchor”, effectively a veto right, granted (possibly) to the representative of the competition authority and/or representative of the institution in charge of macroeconomic policy and development.

Another important element not supporting vesting state aid control in the competition authority is the fact that following the EU accession the competence over state aid control will rest with the European Commission; the coordination unit of the new member state, for coordination and transferring data, should be placed in the institution that has the best overview over relevant data and an additionally very important element, according to the EU Progress Reports for all candidates, the field of antitrust is not as strictly observed and evaluated as the field of state aid; however, this means that the focus will be on state aid. Bearing in mind all the challenges related to scarce human and financial resources in the field of antitrust, state aid policy will represent a top priority, with antitrust enforcement suffering accordingly.

If state aid policy is a very detailed and clear element of comprehensive economic and competition policy, consumer protection represents a completely different category. As already briefly elaborated, it is a question of how we understand the term *consumer protection*: is it protection from consumer fraud, is it a policy of comprehensive information of consumers, and of course the question who should implement it?

The state administration has the firm obligation to adopt and implement laws that will not harm consumers. There are different institutions, such as inspectorates: market surveillance authorities, phytosanitary inspectorates, etc. that are tasked with controlling the market conditions, in order to provide the required standards to consumers. Competition authorities, if they are efficient in their enforcement, provide consumers with a better choice and better price-quality ratio, as a result of efficient competition in the market.

What kind of additional protection still needed, in addition to the one originally provided by the general legal framework and credible enforcement of the institutions concerned? And from whom to protect the consumers? The state institutions, relevant authorities, should provide their services in the interest of the public, bearing in mind that they are financed from the budget, they should always have in mind that the taxpayers, and in broader sense consumers, provide the financial resources for their operations. The fact is that if the consumer rights are not respected, or even infringed, the general civil framework exists to provide the rules, and the courts are there to provide the protection.

The role of consumer organizations is very important in providing proper information in order to promote average consumers to reasonable consumers.

It is unclear what kind of consumer is the focus of our interest: the average consumer or the reasonable one. The reasonable consumer is a properly informed consumer, knowing her/his rights and the consumer policy can be a subject of different models. Nevertheless, the combination of different policies and different goals under the same roof, the one of competition authority, bearing in mind that some policies have only recently been introduced, may not always lead to the desired results.

6 Concluding Remarks

There are different models of implementation for different policies. Even for antitrust and merger control there is not necessarily just one institution in each jurisdiction, and the scope of competence of some institutions may be broad. The choice of the best institutional model is still the relevant dilemma in many jurisdictions.

One should not follow the populist approach according to which it would be less expensive if two or more institutions were merged to cut costs. Cutting costs is not the way to introduce efficient institutions. Efficient institutions are not dependent on the number of staff, but on the level of their qualification, good management, and full independence, and that model cannot be considered as a cheap solution. Without investments (in human resources) good results cannot be expected. Although investments may be considered expensive, it can be said that the most expensive investment is the one you do not make.

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