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WHERE DO WE STAND WITH HARMONIZATION OF SUBSTANTIVE CRIMINAL LAW IN EU? REMARKS ON THE CHANGES INTRODUCED BY THE LISBON TREATY

INTRODUCTION

Since the entry into force of the Maastricht Treaty in 1993 the harmonization[1] of substantive penal law has been an essential but sensitive element of the European Union (hereinafter: the EU) Member States' cooperation in criminal matters.

Up till now, in the discussions on criminal law emphasis is laid down on the significance of the values of national sovereignty and cultural identity, especially in the EU integration context. In result, it traditionally has been dealt through intergovernmental cooperation within so called third pillar – Justice and Home Affairs. After entering into force of the Amsterdam Treaty it found its place among the objectives of 'an area of freedom, security and justice'[2].

There are many changes introduced in the sphere of criminal law by the Lisbon Treaty[3]. As 'the area of freedom, security and justice' encompasses various aspects of the criminal cooperation in the EU it would be impossible to present all of them in this short contribution.

The particular aim of this article is to present the latest regulations relating to the harmonization of substantive criminal law. Before discussing them one additional comment is needed. As is generally known, the harmonization of criminal laws in the EU is not restricted to the questions of crimes and penalties but it deals with general principles of criminal law, criminal procedure and legislation relating to the operational and practical cooperation in criminal matters as well[4]. Limiting this article to the harmonization of substantive criminal law has a principal reason: in the opinion of the author these are material law's provisions that have the primary role in providing for smooth

[1] The author uses in this article the term 'harmonization' instead of 'approximation'. Although the latter is generally used in the EU official documents, the differences in the meaning are, in fact, minor and are essentially based on one factor, which is a restriction of "the approximation approach" to the EU only.

[2] Consolidated version of the Treaty on European Union (as amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing European Communities and related acts), OJ C 325/5 (2002).

[3] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306/01 (2007).

[4] The phenomenon of the harmonization of criminal law also takes place on the level of international law, just to give an example of mutual influence between the law of the International Criminal Court and national laws. See e.g. Rogacka-Rzewnicka, 2009.

and effective collaboration in practice. Therefore, their harmonization constitutes basic and necessary prerequisite for the creation of 'the area of freedom, security and justice'.

1. THEORETICAL CONSIDERATIONS

The terminology relating to the subject matter of this article is far from being consistent. In political debates, scientific works and legal texts different terms are used to describe a method or a process that should result, generally speaking, in common understanding and regular application of certain legal norms and rules.

European documents involving criminal legislation expressly use the word 'approximation' and define it as an instrument allowing for "progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties"[5]. As the approximation engages minimum regulation, it consequently leaves the modalities of the implementation of specific legal instruments to the choice of the Member States. This model implies that the aim of approximation is the elimination of national norms in contrast or differing from the EU standards (Vermeulen, 2002: p. 73). One should add that the approximation constitutes a narrow and specific concept, existing exclusively within the EU law.

Nevertheless, much often the term 'harmonization' is used. The main problem with this notion is that currently there is no legal definition of it. Also scholars interpret harmonization of criminal law with different meanings giving little clarification on how this term should be understood. Even though, it is possible to extract common element that is the elimination of disparities between the criminal justice systems of different states. This phenomenon is defined as "making more similar or alike different justice systems or parts of it" and "the realization of improvement and harmony with the absence of disparities" (Tadić, 2002: pp. 8–9). Another proposition suggests that the harmonization of criminal legislation should not aim at eliminating differences among legal systems but rather at removing frictions (understood as symptoms and expression of disorder within a system of laws) and in order to make different systems more consistent among them (Nelles, 2002: p. 34). In result, it should be used only when frictions exist and need to be removed (Calderoni, 2010: p. 3). The latter seems to be more accurate in the context of criminal law, which undoubtedly constitutes system of law where essential degree of autonomy for national legislators is needed and supranational institutions should act only if it is necessary to achieve common goals.

Before the changes brought about the Lisbon Treaty are discussed, a short account should be given on what are the general functions and aims of harmonization. In doctrine the autonomous and auxiliary functions of harmonization are distinguished (Weyembergh, 2005: pp. 1582–1584). The first one denotes that the harmonization of criminal law of the EU Member States is an autonomous means to create, the area of freedom, security and justice. In that sense, the harmonization provides for equal legal protection within the EU and helps to fight crime because criminals cannot take advantage from differences in penalization. The support function is based on the presumption that the lesser differences between the EU Member States' criminal law systems make the cooperation between them possible and more effective. In this sense it

[5] TUE, article 31(1)(e).

builds on mutual confidence and trust that the legal systems of Member States have, to the agreed extend, similar norms and rules.

2. HARMONIZATION IN THE LISBON TREATY

2.1. GENERAL REMARKS

To discuss fully the amendments introduced by the Lisbon Treaty with regard to the harmonization of substantive criminal law it is necessary to present both the general provisions that have an impact on the issue of harmonization, mainly some aspects of the legislative procedure and the specific regulations relating to harmonization as such.

The first adjustment, being the direct effect of abolishing the pillar structure of the EU, is the introduction of the ordinary procedure while voting on the criminal law's matters. It means the shift to qualified majority voting instead of unanimity. It means also that the European Parliament is involved in the procedure with the possibility to bring a proposal to the end.

Secondly, the form of the legal instrument has been changed. The former framework decision was replaced by a directive. However, both types of these legal acts are quite similar: each member state is obliged to adopt provisions in its own legal system to implement them. The main difference lies in the direct effect. Article 34(2)(b) of the former Treaty on European Union (hereinafter: TEU) *expressis verbis* stated that the framework decisions shall not entail direct effect. Now, in relation to the directives there is no such provision.

Thirdly and most importantly, the European Commission (hereinafter: the Commission) has gained the full powers to effectively control Member States if they properly, promptly and correctly implement relevant criminal law's provisions into national legal framework with the competence to bring a case against a state before the Court of Justice (hereinafter: ECJ).

2.2. TFEU ON HARMONIZATION OF SUBSTANTIVE CRIMINAL LAW

The provisions comprising the former third pillar are included in title V of the Treaty on the Functioning of the European Union (hereinafter TFEU)[6]. For the subject matter of this article, of the interest here are Chapter 1 (General provisions), Chapter 4 (Judicial cooperation in criminal matters) and, specifically, article 83 TFEU in which the issue of harmonisation of criminal laws is dealt with.

A reference to article 67(3) TFEU helps to identify the position of harmonization among all the measures intended "to ensure high level of security" of the Union. This provision lists the instruments that should be employed in order to establish 'an area of freedom, security and justice' and does it in specific and systematized order. It places "the approximation of criminal laws" on the last place and makes it restricted by the condition of necessity. Moreover, article 82(1) TFEU states that "judicial cooperation in criminal matters in the Union shall be based on the principle of mutual reco-

[6] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83/2010.

gnition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States". On its part, this clause shows the relation between these two principles. Accordingly, the principle of mutual recognition, described as "the motor of the European integration in criminal law in recent years" (Mitsilegas, 2006: p. 1277), explicitly was made the cornerstone of the judicial cooperation in criminal matters. Clearly, it occupies more prominent position as is declared a general principle of cooperation without any restriction while the harmonization of the criminal law is either interconnected with the development of the mutual recognition in the field of criminal procedure (article 82(2) TFEU) or limited to specific offences (article 83(1) TFEU).

Moreover, the Lisbon Treaty has clarified the questions of the scope and subject of harmonization. An innovation is the direct indication in article 83(1) TFEU which areas of crimes can be subjected to the harmonization efforts within the EU. Currently, this article lists following areas: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. There are some areas of crimes that formerly had not been included in TEU although in practice the EU institutions adopted some legal instruments dealing with them.

The changes relating to the list of crimes are understandable and logical. The EU was given an explicit competence constituting the justification for already adopted legal acts. In consequence, one can argue that there has been no modification of the EU competence in the field of substantive criminal law as the list included in article 83(2) TFEU simply constitutes the acceptance of the previously prevailing practice (Peers, 2008: p. 518). However, it is necessary to take into account that the implicit competence of the EU to harmonize criminal law in certain areas not mentioned directly in the treaties could have been accepted as long as each Member State had a power of veto and could turn down a proposal for such a legal act. Currently, with the ordinary procedure in place when Member State can be outvoted and thus in some way forced to implement legal provisions that it does not want, such an indirect extension is at least objectionable.

The correct understanding founds its verification in the last sentence of article 83(1) TFEU, which for the inclusion of new areas of crime (meeting the criteria of particular seriousness and cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis) as apt for harmonization requires a unanimous decision by the Council. Moreover, such decision has to be founded on the basis of developments in crime[7].

According to the wording of article 83(1) TFEU the harmonization takes place in relation to two aspects of criminal law: the definitions of criminal offences and the sanctions (penalties) in the areas concerned. What is important here, it is to note that the EU competence relates only to the establishment of 'minimum rules'. It means that the Member States are obligated to introduced into their legal systems certain norms but not excluding further-reaching solutions. Consequently, the harmonization of substantive

[7] Interestingly, in order to remedy the lack of statistics on crime and criminal justice at the EU level and to provide an organizing framework for legislation dealing with emergent or evolving forms of criminality the special EU Action Plan was launched in 2006.

criminal law in the EU entails the questions of incrimination – by defining sets of behaviours which must be criminalized by national law and of sanctions – through the indication of the level of penalties which must not be undercut by national legislation.

In addition to already mentioned above main functions of harmonization, there are also some more specific for the field of substantive criminal law. The harmonization of constituent elements of criminal acts assures that all EU Member States make certain behaviour a criminal offence in order to avoid safe havens for criminals within the whole Union. Also, it facilitates the forms of cooperation that traditionally require double criminality. Moreover, it brings coherence in the definitions of these crimes which are considered priority by the EU. On its part, setting minimum penalties that core crimes incur provides for more severe punishment and precludes the criminals to take advantages of lenient sentencing that could exist in some states without harmonization efforts (Vermeulen, 2002: pp. 74–75).

Another novel regulation is included in article 83(2) TFEU, which provides that if "the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". There was no such provision in the former treaties, though it should be considered rather a formal sanctioning of the ECJ judgements in the so called *Environmental sanctions*[8] and *Ship Source Pollution*[9] cases than a innovative competence.

Clearly, the Lisbon Treaty takes into account the recent ECJ case-law on criminal law, particularly in regard to the competence to harmonize criminal law sanctions for violation of the European (non-criminal) standards and regulations[10]. In any case, the introduction of this provision to TFEU puts an end to the previous disputes of whether there was a implied competence for the European Community (hereinafter: EC) institutions to legislate in criminal law in the absence of an explicit mandate. Currently, such a subsidiary competence is established.

One should note that the Lisbon Treaty has not amounted to the complete 'communitarization" in the discussed field. 'The area of freedom, security and justice' still creates separate regime with specific features, and 'European criminal law' differentiates from the rest of the EU legislation in this regard that it provides for the guarantees for states that do not agree on certain legal acts.

Specifically, article 83(3) TFEU gives the possibility to apply so called emergency brake if the provision in question would affect fundamental aspects of national criminal justice system. The primary question is what does a formula "fundamental aspects of national criminal justice" mean? As it relates to criminal law, there is no doubt that it must be interpreted strictly (Peers, 2008: p. 527; Herlin-Karnell, 2008: pp. 6–7). The problem is in settling on if it refers to all the aspects of constitutional importance and rank or the strict interpretation limits its scope precisely to the criminal justice system (Peers, 2008: p. 526). It seems that the first option is a correct one. In national law's system it is hardly conceivable to make strict distinctions between 'constitutional' and 'criminal'

[8] Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

[9] Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

[10] This issue is elaborated in more details below.

while discussing, just to give an example, the issues of the sentence for life or of the offences relating to the freedom of religion and speech.

On the basis of article 83(3) TFEU each Member State is entitled to request the referral of the draft directive to the European Council. In consequence, the ordinary legislative procedure is suspended. Then, only reaching a *consensus* allows for the termination of the ordinary legislative procedure's suspension. Undoubtedly, the notion of an emergency brake is attractive for the Member States with a strong relationship between the criminal law and the nation state, hence remedies the Member States anxiety about the loss of their national sovereignty in criminal law matters (Herlin-Karnell, 2010: pp. 1117–1118).

On the other hand, the emergency brake's mechanism gives the opportunity to other Member States to move further by establishing the enhanced cooperation. In successive proceeding the provisions on enhanced cooperation shall apply[11]. Interestingly, some authors claim that allowing this procedure in relation to the cooperation in criminal matters may put off states from resorting to blocking procedure too often (Grzelak, 2009: p. 149). This thought should be assessed correct: the creation of a group of states within the EU having more advanced or simply dissimilar norms from other states, especially in the field of substantive criminal law, may impel the fragmentation of the EU law and, in effect, be the impediment for the establishment of 'the area of freedom, security and justice'.

A particular guarantee is provided for some states by Protocol No. 21 (Ireland and the United Kingdom) and Protocol No. 22 (Denmark) to the Lisbon Treaty[12]. These states opted-out of the area of freedom, security and justice. Accordingly, they will be bound by the EU criminal law's provisions only if they express a will to join to all or some of the measures adopted in this field.

3. HARMONIZATION TILL NOW

Article 31(1)(e) of the former TEU made the harmonization of substantive criminal law possible in the fields of organized crime, terrorism and illicit drug trafficking. Nonetheless, framework decisions have dealt with a wide range of offences such as high-tech crimes, trafficking in human beings, financial crimes, tax fraud or sexual exploitation of children. In consequence, a great number of legal acts encompassing all areas of crime listed in article 83(1) TFEU have been adopted before the Lisbon Treaty came into force. Surely, the EU institutions disregarded the essentially restricted mandate given to them – that is to adopt measures establishing minimum rules relating to substantive criminal law in only a limited number of subject areas (Vermeulen, 2002: p. 70).

Although the harmonization measures relating to substantive criminal law were undertaken mainly by the instruments of the former third pillar, quite surprisingly, also the EC directives were used for virtually the same purpose. This second mode of harmonization applied in case of certain policies falling directly under the former first pillar.

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[11] They are included in Chapter IV of the Treaty on European Union.

[12] See Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol (No. 22) on the position of Denmark, OJ C 83/299 (2010).

This particular development would not occur without the impact of the ECJ jurisprudence. A landmark case – mentioned above *Environmental sanctions*' case had been delivered by the Court in 2005. The main allegation was a procedural one: the Commission requested annulling the Framework Decision 2003/80/JAI on the protection of the environment through criminal law on the basis that the Council had applied erroneous legal basis (provisions relating to the third pillar instead of those proper for the first pillar legislative procedures) [13]. The ECJ, after analyzing the substance and aim of the framework decision, decided to annul it[14].

It was stated above that that had been "a landmark case". Indeed, it was. Until that judgment it was apparent that the harmonization of national criminal laws constitutes a competence of the EU Member States under the third pillar, while the EC does not generally have such a competence[15]. However, in the *Environmental sanctions*' judgment the Court established some conditions, fulfillment of which allowed harmonizing national criminal laws on definitions of criminal offences: essential character of the harmonizing measure; that is necessary in order to ensure full effectiveness of adopted rules; and with regard to serious offences[16]. In the *Ship Source Pollution* judgment the Court clarified the scope of the EC competence in criminal matters, concluding that the EC legislator does not have competence to decide on the type and level of criminal sanctions[17].

In consequence, these judgments created the division of competences in criminal law between the Member States using intergovernmental mode of creating legal acts and the communitarized approach in the EC. In legal terms it did not grant the Community the general competence in this field and only clarified that the approximation of states' legal systems in the area of criminal law, when it concerns the crimes infringing common policies, should have been subjected to the procedures proper for the particular policy (Grzelak, 2009: p. 60). However, *de facto* it allowed the EC to legislate on specific criminal substantive law's issues like the environmental offences[18].

The Lisbon Treaty has entered into force in December 2009. Nevertheless, the first directives involving the harmonization of criminal substantive law and based on the Title V provisions of TFEU has been adopted in 2011. The majority of them replace

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[13] Case C-176/03 *Commission v. Council* [2005] ECR I-7879, § 2–15.

[14] *Ibidem*, § 55.

[15] See e.g. the well known *Lemmens case* (Case C-226/97, ECR I-3711, § 19) where the Court held as follows: "Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, it does not follow that this branch of the law cannot be affected by Community law".

[16] Case C-176/03, § 48, which precisely provides that "[…] the last-mentioned finding (on the general lack of competence to legislate in criminal law) does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".

[17] Case C-440/05, § 70.

[18] Indeed, the EC institutions took the advantage of that judgment and had adopted the directives on criminal substantive law before the Lisbon Treaty entered into force, the Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law (OJ L 328/88/2008) being the primary example.

previous framework decisions[19]. The justifications given for this legislative activity are similar in all the cases. Firstly, they refer to the inadequacies of framework decisions: insufficient or erratic implementation, the eventuality to invoke exception or reservation while transposing framework decisions into national legal systems and the lack of the effective mechanisms of control over the Member States. Secondly, the emergence of a new forms and types of criminal behaviours within particular area of crime that need to be penalized is taken into account[20]. To give an example, the Directive on trafficking in human beings of 5th April 2011 adopts a broader concept what should be considered trafficking in human beings and includes additional forms of exploitations such as forced begging, exploitation of criminal activities (that is exploitation of a person to commit e.g. pick-pocketing, shop-lifting, drug trafficking and other crimes that are subject to penalties and involve financial gain) or removal of organs that were not incorporated in the former framework decisions[21]. What is more, in addition to harmonizing the EU Member States' substantive criminal laws, it establishes robust provisions on victims' protection. This particular developments are crucial in the light of the general tendency, not only in European but also in international criminal law, towards the idea of restorative justice giving the priority to the needs and rights of the victims and not the perpetrators of crimes.

CONCLUSIONS

The Lisbon Treaty has brought about many changes into the functioning of the EU in the area of freedom, security and justice. Most of them constitute the confirmation of previous practice but these clarifications were necessary for having the Member States willing to fully comply with the rules restricting their competences. Moreover, they allow for the further harmonization of substantive law with regard to the crimes considered the most challenging for Europe.

Obviously, the systematic changes that are the result of the abolishment of the EU pillar structure have the most significant impact. The adjustments in the legislative procedures provided for the increased position of the European and national parliaments[22]. Thus, at least partially, the 'democracy deficit' in the EU has been embarked upon. It is less challenging to persuade the Member States that some modifications in the field of criminal law are indispensable if the procedure is conceived more democratic. Also the introduction of the ordinary legislative procedure should be welcomed as it is both quicker and simpler. Moreover, the shift from the framework decision to the directives

[19] E.g. Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1/2011; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/2/2011.

[20] See e.g. Memo/10/107 of 29 March 2010 concerning the proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography, available at: http://europa.eu/rapid/pressReleases.Action. do?reference=MEMO/10/107 (accessed on 15.10.2011).

[21] See: the Directive 2011/36/EU.

[22] On the role of national parliaments in the area of freedom, security and justice, see Article 12 of the Title II of the TEU ("Provisions on Democratic Principles").

as the instrument applicable to all areas of activity strengthens the consistency and homogeneity of the EU legal system.

The alteration that should have the greatest influence on the future of the EU criminal legislation is the jurisdiction of the Court of Justice over these matters both in terms of interpretation of legal acts and as a control mechanism over Member States as regards their implementation into internal law. The competence of the Court to review the validity and interpret the legal acts adopted in the area of freedom, security and justice is of great importance as they may entail many implications on fundamental rights. Furthermore, citizens are provided with all the means foreseen in the Community legal order for seeking the protection of their rights. In addition, it will help to overcome the main weakness of framework decisions – the absence of effective sanctions that could be used in cases of delayed or invalid transposition (Karsznicki, 2009: p. 73). However, it is not immediate change. According to article 10 of Protocol 36 to the Lisbon Treaty on Transitional Provisions, the full powers of the Court of Justice become applicable to the existing '*acquis*' of the third pillar legislation five years after the entry into force of the Treaty.

The factor that needs to be taken into account while discussing substantive criminal law is that this is an area where the diversity among the Member States is immense for number of reasons: primarily, because of its close relation with the culture and history of each nations and specifics of each society. Both the behaviours which are criminalized and the penalties for offences vary greatly across Member States. Therefore, one cannot forget what the rationale of harmonization is: it is not about making all national criminal law systems alike, it is about using them consistently. Only this approach will prevent criminals from taking advantage of free movement and, in the same time, allow the victims to have anywhere the same level of protection. The Lisbon Treaty sends also another important message, that the aspirations to unify the criminal law systems of the Member States have been moderated and that the Member States are first and foremost responsible for the substance of their criminal laws (Borgers, 2010: p. 354).

Even though harmonization of criminal laws in the contemporary Europe is unavoidable one should note that it does not guarantee that the practical application of adopted legal instruments will always follow the same or at least similar standards. It was assumed that the variety of legal cultures would cause significant differences in their practical application having in mind the far-reaching discrepancies with regard to the understanding of the function of statutorial provisions on the one hand and judicial decisions on the other as well as in the attitude towards the law in general among the diverse legal systems of the EU's Member States (Perron, 2005: p. 19). On the other hand, it was noted that the harmonization of criminal law may constitute a risk for the coherence of particular legal systems (Schünemann, 2004: p. 47). Moreover, it was expressed that it may challenge the position of the national legal orders. However, these concerns seem to be erroneous. The relevance of the national legal order in both international and European environment is undisputed. In addition, one should have in mind that it is up to the Member States how the practical implementation of the directives will be conducted, therefore there is an opportunity to avoid any incompatibility with existing national criminal laws.

Recently, the Commission has made an assessment of the scope and role of EU criminal law and it strongly underlined its 'added value' to the existing national criminal law systems. Firstly, it was noted that EU criminal law fosters the confidence of ci-

tizens through a more effective fight against crime. Secondly, the Commission stated that the common rules strengthen mutual trust among the judiciaries and law enforcement measures as national authorities feel more comfortable recognizing decision taken in another Member State if the definitions of the underlying criminal offences are compatible and there is a minimum approximation of sanction level. Furthermore, it was emphasized that the harmonized criminal law helps to prevent and sanction serious offences against EU law in important policy areas[23].

Undoubtedly, all these arguments are correct. Nevertheless, it should be born in mind that that the EU is only competent to legislate not to apply criminal law which is left for the Member States. In consequence, the appropriate implementation and efficient enforcement of common rules are the imperative requirements for creating the genuine 'area of freedom, security and justice'. In practice, therefore, it depends by and large on the willingness of the Member States to act together in order to achieve this objective.

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