Negotiation and Transposition of the PIF Directive – The German Perspective

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Article

ABSTRACT

This article reflects on the negotiations concerning Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") and discusses some of the controversial issues at that time from a criminal law policy perspective. Germany's approach to the transposition of the PIF Directive is explained, and the article also presents the corresponding amendments made to the German Criminal Code as well as the provisions in the newly created Act to Strengthen the Protection of the EU's Financial Interests (EU-Finanzschutzstärkungsgesetz).

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In 2001, the European Commission presented its "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor."[1] The intention was to "broaden and deepen the debate on the Commission proposal [to establish a European Public Prosecutor] with a view to its being considered by the Convention which is to prepare for the next Treaty revision."[2] Reactions from Germany were not very enthusiastic. "The notion that effective protection of the Communities' financial interests can only be guaranteed by instituting a European Public Prosecutor's Office is far from compelling," cautioned authors of the Joint Statement by the Federal Government and States of the Federal Republic of Germany.[3] On harmonisation of substantive criminal law, it reads: "Because of their different legal traditions, limits are imposed on harmonisation through the different systems of sanctions in the Member States."[4] Twenty years later, things have changed. The European Public Prosecutor's Office started its operations on 1 June 2021 and prosecutes criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"),[5] as implemented by national law.

I. A Look Back at the Negotiations

Seeing where the EU and its Member States started might help us understand why negotiations on legislative acts in the area of the protection of the EU's financial interests, in particular on the PIF Directive, were difficult and took quite long. The proposal for a PIF Directive was presented in 2012[6] and adopted five years later in 2017. There were a number of controversial issues that could only be resolved by reaching compromises in intensive negotiations.[7] The spirit of compromise is obvious in the structure and language of many of the PIF Directive's provisions. The following outlines some of the most controversial issues during the negotiations on the legal instrument.

1. Legal basis

The position of the Council was that the PIF Directive should rely on Art. 83(2) of the Treaty on the Functioning of the European Union (TFEU), i.e., the legal basis for the "approximation of national criminal law to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures."[8] The Commission instead opted for Art. 325(4) TFEU, i.e., the legal basis for "necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests." Backed by an opinion of its Legal Service,[9] the Council prevailed and the PIF Directive was based on Art. 83(2) TFEU. In practical terms, the choice of legal basis did not make much of a difference, except for Denmark not being bound by a directive based on Art. 83(2) TFEU. Ireland had opted in, unlike the United Kingdom;[10] however, it must be borne in mind that the UK would leave the EU a few years later anyway. The "emergency brake" for the harmonisation of substantive criminal law, which would give a Member State the possibility to suspend the legislative procedure and which is only foreseen in Art. 83 (para. 3) TFEU, but not for the measures under Art. 325 TFEU, was never an issue in the negotiations. Another difference was the wording of the two articles under debate, which did not seem to have had any impact either: under 83(2) TFEU, the approximation of criminal laws is only allowed if proven "essential" to ensuring the effective implementation of a Union policy; under Art. 325(4) TFEU, "necessary measures" may be adopted.

2. Value added tax fraud

A second conflict between the Council, on the one hand, and the Commission and the European Parliament, on the other, was about the inclusion of value added tax (VAT) fraud in the scope of the directive. A certain

percentage of the Member States' contribution to the EU budget is based on their VAT revenues. From a national perspective,[11] however, VAT must be considered a domestic tax and, hence, national revenue going to the national budget. The fact that VAT revenue also serves as a parameter for the mathematical calculation of Member States' contributions to the EU budget does not make VAT either an EU tax or EU revenue. There was little possibility to resolve this conundrum. A compromise was only found after a long deadlock in the negotiations, namely after the Council conceded that "cases of serious offences" against the common VAT system could fall under the PIF Directive. Such cases must have a cross-border dimension (connected with the territory of two or more Member States) and involve a total damage of at least €10 million (Art. 2(2) PIF Directive).[12] The CJEU's decision in *Taricco* had a major impact on this outcome: during trilogue negotiations in 2015, the judgement held that "the concept [of the EU's financial interests] […] covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules."[13] According to the Court, "[t]hat conclusion cannot be called into question by the fact that VAT is not collected directly for the account of the European Union […]."[14] This decision considerably weakened the Council's position, although it would have been possible to separate the legal question of whether or not there is a legal basis for the EU to harmonise national VAT fraud laws from the political question of whether or not the EU should actually make use of such a competence.

3. Minimum-minimum sanctions

A third issue of controversy concerned the provisions requiring certain minimum imprisonment terms for serious offences. The Commission would have liked Member States to introduce minimum sentences of at least six months that would have to be imposed in cases in which the damage or advantage involved is above a certain threshold.[15] This was contrary to the Council's conclusion of 2009 on "Model provisions, guiding the Council's criminal law deliberations,"[16] according to which the approximation of criminal laws under Art. 83(2) TFEU should follow the practice of setting the minimum level of a maximum (not minimum) penalty. Common levels for minimum sanctions can be challenging for national legislators, as they are not easily integrated into traditional sentencing frameworks.[17] In particular, taking the approach that a certain damage or advantage threshold should automatically trigger an increased minimum sentence, irrespective of other aggravating and mitigating factors in the case at hand, seems contrary to traditional sentencing criteria that include a variety of circumstances in addition to damages and advantages. The Council prevailed on this issue and no levels for minimum sentences were set in the PIF Directive.

4. Limitation periods

An agreement on limitation periods was also not easily reached because of the different systems and approaches in the Member States. In this respect, the PIF Directive's compromise solution (Art. 12) cannot be considered overly ambitious. For the offences referred to in Art. 3, 4 and 5 PIF-Directive, which are punishable by a maximum sanction of at least four years of imprisonment, the PIF-Directive requires a limitation period for prosecution of no more than three years provided that this period "may be interrupted or suspended in the event of specified acts" (Art. 12(1)(2)). The limitation period for the enforcement of penalties is five years where the penalty is more than one year or where the underlying criminal offence is punishable by a maximum sanction of at least four years of imprisonment; this five-year limitation period may also be reached by counting in "extensions arising from interruption or suspension" (Art. 12(4) PIF-Directive).

5. No irregularity without a criminal penalty?

There has been some criticism that the PIF Directive is a missed opportunity and that its provisions are not robust enough to effectively protect the EU's financial interests.[18] It is certainly true that the directive reflects a compromise and that it may not be the most coherent and easy-to-read document. However, the directive is not directly applicable by law enforcement authorities and courts but instead addresses Member States and, to a certain extent, also the EPPO. The other question is whether the PIF Directive is "too soft" on fraudsters and leaves serious loopholes, as claimed by some. This depends on the standards and expectations by which the PIF Directive is to be assessed. If one comes from a traditional approach regarding the harmonisation of the internal market, measures should aim to be as comprehensive as possible and at a high level. If this kind of thinking is applied to criminal law, the objective would be to criminalize as widely and as stringently as possible and to create a common European area of maximum criminalization.[19] This position was not shared by those who believe that criminalization should be limited to serious wrongdoings for which a criminal law response is essential (as required by Art. 83(2) TFEU). Two provisions from the Commission's proposal might illustrate this point.

a) Good information, bad intentions?

According to Art. 4(1) of the Commission proposal,[20] "Member States shall take the necessary measures to ensure that any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union's financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, is punishable as a criminal offence."

This is certainly intricate and might be paraphrased as follows in concise language: "The provision of [true and accurate] information to authorities in a public procurement procedure with the aim of circumventing or skewing the application of award criteria is punishable as a criminal offence." What kinds of cases would that cover? Imagine, for example, an entrepreneur bidding on a construction contract. The contractor is aware that the official who will award the contract is a big soccer fan. To take advantage of this, the contractor includes in his bid not only the required information on himself and his company but also mentions that his two children are aspiring professional soccer players, with the clear intent that this unsolicited piece of information does the trick and helps him win the contract.

Different opinions exist on the need for and proportionality of punishing (with fines or imprisonment) conduct that does not result in any damage to the EU's financial interests and cannot even be qualified as preparatory conduct for any substantial wrongdoing.[21] In any case, criminalizing it does not seem to be "essential" in the meaning of Art. 83(2) TFEU. In the end, the provision did not become part of the PIF Directive.

b) Fraud without misrepresentation, breach of trust without entrustment?

Art. 3 – the PIF Directive's fraud provision – is modelled after the PIF Convention,[22] which is itself inspired by common law fraud doctrine. Art. 3 includes different rules for expenditure/revenue, and within these categories there are again different rules, depending on the type of expenditure/revenue and on the conduct to be criminalized. This complex structure is not self-explanatory and is the result of compromises reached during the negotiations, particularly as regards the provision on misapplication of funds or assets. The initial proposal by the Commission for the misapplication of expenditure read as follows: "the misapplication of […] expenditure for purposes other than those for which they were granted [is a criminal offence]."[23]

From a civil law perspective, one might notethat this is supposed to be a fraud provision, yet there is neither a misrepresentation required, nor any kind of damage to the fraud victim, let alone intent on the part of perpetrators to enrich themselves. The proposed provision could also be interpreted as being an offence of breach of trust, yet there is no requirement that the perpetrator be entrusted with the management of EU funds and, again, no element of damage is included. The provision is, of course, not completely new and, in principle, had already been stipulated in Art. 1(1)(a) of the PIF Convention.[24] In fact, the provision makes sense for fraud relating to subsidy and aid expenditure, and it can be argued that the PIF Convention was meant to apply only to such type of expenditures.[25] In the case of subsidies and aid, the EU spends money without typically expecting any contractual return. Therefore, it can be challenging to identify fraud damage. Subsidies and aid are predominantly granted for specific purposes, and any intentional misapplication in contravention of their purpose can already be considered criminal conduct. This is why a misapplication provision for subsidies and aid that criminalizes without requiring an offence element of deception, damage, or entrustment is justifiable. Unlike the PIF Convention, however, the PIF Directive does not apply only to subsidy and aid expenditure but also to any other type of expenditure. Yet, other types of expenditure, such as salaries and procurement payments, typically lack a specific purpose and therefore cannot be "misapplied." Even if a specific purpose is stipulated by a contract, misapplication amounts to nothing more than a mere breach of contract that might only justify criminalization if it involves misrepresentation and results in a damage.

Take the following example: Contractor A is awarded a contract in an EU public procurement procedure. There were neither irregularities in the entire procedure, nor any indication of fraudulent intent; no false statements or documents were presented. In line with the terms of the contract, A received an advance payment. The contract required A to use the advance payment only for the purposes of the contract (e.g., to purchase the goods necessary to perform the contract). At the time of receipt of payment, A had no intention to use the payment for any other purpose. Later on, he decided to use the money for a different purpose. No damage was caused to the EU's financial interests, however, as A managed to fulfil the contract by using money from another source.

Criminalizing a breach of contract not involving any misrepresentation and not resulting in any damage would go rather far and, again, does not seem "essential" for the protection of the EU's financial interests in the sense of Art. 83(2) TFEU. The final text of the PIF Directive reflects this in its different provisions on non-procurement-related expenditure, i.e., aid and subsidy (Art. 3(2)(a) PIF Directive), on the one hand, and procurement-related expenditure (Art. 3(2)(b) PIF Directive), on the other.

II. Transposition of the PIF Directive in Germany

In principle, there are two options for the transposition of the PIF Directive: On the one hand, establishing a new stand-alone act for PIF offences, i.e., a more or less full-fledged criminal code for all crimes affecting the EU's financial interests, would make provisions applying to PIF cases easier to identify and apply. Also, by starting from scratch, the legislator could use "directive-like" language and would not need to build on and refer to existing traditional descriptions of fraud elements. On the other hand, replicating the directive in a new stand-alone act would largely create a parallel framework existing alongside rules already in place, causing considerable overlap and doubts as to which provisions take precedence in mixed cases, i.e., in cases where not only the EU's financial interests but also domestic or private parties' interests are affected. The latter approach also would not easily fit into traditional fraud concepts and create inconsistencies.

The second option would mean identifying gaps in the existing framework and, where necessary, making tailor-made amendments in order to ensure comprehensive and accurate transposition. This option offers the advantage that it could draw on an existing and well-known legal framework. It would integrate new

provisions into this framework, avoid overlap, and ensure consistency. Germany basically took this path by screening the existing legislation for implementation needs. As a result, the German legislator adopted amendments to the (German) Criminal Code and created a new, complementary legal act with provisions required by the directive but not lending themselves to integration in the Criminal Code. The following outlines the amendments made to the Criminal Code and the provisions of the new Act to Strengthen the Protection of the EU's Financial Interests (*EU-Finanzschutzstärkungsgesetz*). As far as the Directive had already been transposed by existing legislation, an in-depth analysis will not be made; reference is made in this context to the transposition bill's detailed explanatory memorandum.[26]

1. Amendments to the Criminal Code

Art. 3(2)(a) PIF Directive, which covers non-procurement-related fraud, was already largely implemented by the Criminal Code's stand-alone subsidy fraud offence (section 264 Criminal Code); the provision also applies to misapplication without requiring proof of any damage. Since attempted misapplication as mandated by Art. 5(2) PIF Directive was not punishable in Germany, however, the Criminal Code had to be amended accordingly (cf. section 264(4) Criminal Code).

Concerning the money laundering offence (Art. 4(1) PIF Directive), the German government's transposition bill referred to section 261 in the Criminal Code, which had used a combined serious crime and list approach for its predicate offences. A comprehensive reform of the money laundering offence entered into force on 18 March 2021,[27] which abolished the limited list of predicate offences and introduced an all-crime approach.

2. Act to Strengthen the Protection of the EU's Financial Interests – EU-Finanzschutzstärkungsgesetz

a) Fraud concerning procurement-related expenditure

Art. 3(2)(b) PIF Directive regulates fraud concerning procurement-related expenditure. The provision includes a damage as an element of the offence and allows Member States to require, as an additional element, that the fraud have been committed "in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests."

In Germany, the provision was largely covered by the existing fraud offence definition, which does not apply, however, in cases of a mere misapplication of "funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests" (Art. 3(2)(b)(iii)). The new Act to Strengthen the Protection of the EU's Financial Interests establishes a tailor-made misapplication offence (section 1). It includes the elements explicitly permitted by the directive, namely the intent to "make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests."

b) Non-VAT-related revenue fraud

Fraud affecting the Union's financial interests in respect of revenue other than revenue arising from VAT own resources (Art. 3(2)(c) PIF Directive) was largely covered by the already existing tax offences applying to the evasion of customs duties and agricultural levies. The tax offences do not cover other types of revenue, however, such as income from real estate sales or rentals, interest on deposits, or fees on EU staff salaries. For these types of revenue, the "ordinary" fraud offence (section 263 Criminal Code) would apply, but it does, however, require that the perpetrator have acted with the intent to make an unlawful gain by causing a loss to the victim – an element not permitted under the PIF Directive. For this reason, a new provision (Section 2 Act to Strengthen the Protection of the EU's Financial Interests) was created to close this gap. It can be

described as a streamlined fraud offence modelled after the existing tax offences, which also do not require the intent of enrichment.

c) Corruption offences

The provision of the PIF Directive requiring criminalisation of passive and active corruption (Art. 4(2)) had already been largely transposed by existing corruption legislation (sections 331 et seq. Criminal Code). However, these provisions were not fully in compliance with the directive's requirements relating to the bribery of foreign public officials. The broad offences of giving and taking advantages (sections 331, 333 Criminal Code) do not generally apply to the bribery of foreign public officials and also would not meet the minimum-maximum sanctions required by the PIF Directive. Under the foreign bribery offence (sections 332, 334 in conjunction with section 335a Criminal Code), the bribe must have been given or taken in return for an official act that breaches the official's duties. While this element is not permitted by the PIF Directive, the PIF Directive has its own qualifications for the official's act, namely that the official must have acted "in a way which damages or is likely to damage the Union's financial interests."

In practice, an official act that damages or is likely to damage the Union's financial interests would also very likely violate official duties. Hence, one could have argued that, despite the limiting element of "breaching official duties," all relevant bribery cases would have been covered by the existing foreign bribery offence. Nevertheless, a new provision was created (Section 3 Act to Strengthen the Protection of the EU's Financial Interests) to clarify this issue by equating acts damaging or likely to damage the EU's financial interests to acts breaching official duties.

III. Conclusion

The PIF Directive only applies to offences against the EU's financial interests. On the one hand, its scope of application is therefore quite limited, covering only cases in which the EU is the "victim." On the other hand, despite its limitation on the victim's side, the PIF Directive addresses offences that are cornerstones of any national criminal law system: fraud, misappropriation, corruption, and money laundering. Member States have the option of either maintaining their traditional offences in non-PIF cases and creating a new corpus exclusively applicable to PIF cases. Or they can adapt their traditional offences to the PIF Directive's requirements – an approach that risks breaking with long-standing principles of their criminal law. Germany's transposition of the PIF Directive combined both approaches: Its implementing legislation amended the Criminal Code and created PIF-only provisions in a separate Act (the *EU-Finanzschutzstärkungsgesetz*). On the implementation of the PIF Directive, the Commission reports that "in roughly half of the Member States, […] conformity issues in the transposition of the main aspects of these [Article 3 fraud] offences" exist,[28] which gives an idea of how challenging the PIF Directive's transposition can be.

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1. Green Paper from the European Commission on "The Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", COM(2001) 715 final.↩
2. Green Paper, *op. cit.* (n. 1), p. 9.↩
3. Joint Statement by the Federal Government and States of the Federal Republic of Germany "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", p. 2 (available at: <https://ec.europa.eu/anti-fraud/sites/default/files/docs/body/gp_gba_st_de_en.pdf> accessed 30 September 2021).↩
4. Joint Statement, *op cit.* (n. 3), p. 5.↩
5. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29.↩
6. Proposal by the Commission for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final; L. Kuhl, "The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law", (2012) *eucrim*, 63.↩
7. A. Juszczak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2018) *eucrim,* 80, 81; M. Kaiafa-Gbandi, "The protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty

and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union's financial interests", (2018) *Zeitschrift für Internationale Strafrechtsdogmatik* (*ZIS*), 575.↩

8. With some Member States noting their reservation on Art. 83(2) TFEU as the legal basis (General Approach, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Council doc. 10729/13 of 10 June 2013, p. 2), also available at: <https://data.consilium.europa.eu/doc/document/ST%2010729%202013%20INIT/EN/pdf> accessed 30 September 2021.↩
9. Council of the European Union, Opinion of the Legal Service, Council doc. 15309/12, available at: <https://data.consilium.europa.eu/doc/document/ST-15309-2012-INIT/en/pdf> accessed 30 September 2021.↩
10. Recital 36 of the PIF Directive, *op. cit.* (n. 5).↩
11. Not shared by all Members States, c.f. Council, General Approach, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Council doc. 10729/13 of 10 June 2013, p. 2, available at: <https://data.consilium.europa.eu/doc/document/ST%2010729%202013%20INIT/EN/pdf>.↩
12. The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties (Recital 36 of Directive (EU) 2017/1371, *op. cit.* (n. 10)).↩
13. CJEU, 8 September 2015, case C-105/14, *Ivo Taricco and others,* para. 41.↩
14. Ibid.↩
15. Art. 8 of the Commission proposal, COM(2012) 363, *op cit.* (n. 6).↩
16. Council Conclusions of 30 November 2009 on model provisions, guiding the Council's criminal law deliberations, <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/111543.pdf> accessed 30 September 2021.↩
17. See also H. Satzger, "The Harmonisation of Criminal Sanctions in the European Union – A New Approach", (2018) *eucrim*, 115.↩
18. C.f., e.g., C. Di Francesco Maesa, "Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?", (2018) *European Papers*, 1456, <https://www.europeanpapers.eu/en/europeanforum/directive-EU-2017/1371-on-fight-against-fraud-to-union-financial-interests> accessed 30 September 2021.↩
19. N. Persak, "EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation", (2018) *Eur J*, 20; N. Corral-Maraver, "Irrationality as a Challenge to European Criminal Law Policy", (2017) *EuCLR*, 124.↩
20. COM(2012) 363 final, *op. cit.* (n. 6).↩
21. Another question would be why the proposal included this type of conduct but exluded bid-rigging.↩
22. Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *O.J.* C 316, 27.11.1995, 49.↩
23. Art. 3 (a) (iii) of the Commission proposal, COM(2012) 363, *op. cit.* (n. 6).↩
24. *Op. cit.* (n. 22).↩
25. Explanatory Report on the Convention on the Protection of the European Communities' Financial Interest, *O.J.* C 191, 23.6.1997, 1, 14: "Expenditure means not only subsidies and aid directly administered by the general budget of the Communities but also subsidies and aid entered in budgets administered by the Communities or on their behalf. This basically means subsidies and aid paid by the European Agricultural Guidance and Guarantee Fund and by the Structural Funds...".↩
26. Regierungsentwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2017/1371 des Europäischen Parlaments und des Rates vom 5. Juli 2017 über die strafrechtliche Bekämpfung von gegen die finanziellen Interessen der Union gerichtetem Betrug, Bundestagsdrucksache 19/7886.↩
27. Gesetz zur Verbesserung der strafrechtlichen Bekämpfung der Geldwäsche vom 9. März 2021, BGBl. I, S. 327.↩
28. Report from the Commission on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law of 6 September 2021, COM (2021) 536 final, p. 4; also available at: <https://data.consilium.europa.eu/doc/document/ST-11630-2021-INIT/en/pdf> accessed 30 September 2021. For the report, see also the contribution of W. van Ballegooij, in this issue.↩

* Author statement

The views set out in this article are those of the author and do not necessarily reflect the official opinion of the his employer, the German Federal Ministry of Justice and Consumer Protection.

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