INFRINGEMENT PROCEEDINGS – ROMANIAN SETTING AND EUROPEAN TRENDS

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ABSTRACT: *Infringement proceedings provided for by the Treaties of the European Union have not yet been used at full by or against Romania. The research aims to provide an analytic description of the legal framework, of the pending proceedings and of the effects that completed cases have on Romanian law.*

KEYWORDS*: Romania; failure by a Member State to fulfil its obligations; Case C-522/09; Case C-405/13; Case C-406/13; Case C-104/15; preliminary ruling and infringement proceedings*
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1. REMARKS ON THE ACTIONS BROUGHT AGAINST THE FAILURE OF A MEMBER STATE TO FULFIL OBLIGATIONS: NATURAL OR LEGAL PERSONS AGAINST MEMBER STATES? THE ROLE OF THE REFERENCE FOR A PRELIMINARY RULING IN THE ACTIONS BROUGHT AGAINST THE FAILURE TO FULFIL OBLIGATIONS.

The action filed against the failure of a Member State to fulfil obligations[1] is one of the main elements that define the special features of the Court of Justice of the European Union, features which reverberate even upon the institutional design of the European Union (Lenarts, fără an)[2](Materne, 2012). This procedural vehicle, of a judicial nature, governed by Article 258 TFEU (ex-Article 226 TFEU) (the European Commission submits the matter to the Court of Justice), as well as by Articles 259 and 260 TFEU (a Member State brings the matter before the Court of Justice), is part of the fundamental organizational elements of the European Union, whereby the Member States are bound to comply with the EU law.[3] The liability of the State is one of international law, with

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[1] For conceptual delimitations and a brief commentary on the provisions of the treaty, see: (Şandru, 2015)
[2] f p.13.
[3] On the fulfilment of obligations when a person/entity is part of a group, in the light of the principle of solidarity, see: (Taylor, no. 2/2015).

features that are specific to the proceedings established by the EU law. The Court of Justice is restricted by the scope of application of the Treaty on the Functioning of the European Union (TFEU). Thereby, in Case *Molter v Germany*,[4] the action of a natural or legal person to establish an infringement of the EU law by a Member State was dismissed as being inadmissible.[5] A natural or legal person has the possibility to determine the setting into motion of the proceedings covered by Article 258 TFEU by submitting pleadings to the European Commission. If the Commission shall provide a response by issuing a decision – which has the features provided for by Article 263 TFEU (direct and individual concern), the decision in question may be challenged at the General Court of the European Union; however, the European Commission retains a wide margin of discretion in relation to the initiation of proceedings to establish the infringement of obligations also in the next procedural step (including the withdrawal of the action). In Case *Unión de Pequeños Agricultores v Council of the European Union*,[6] the Court pointed out (paragr. 7 of the decision) the fact that the European courts must analyse the nature of an act in line with its features, namely whether it has the nature of a decision within the meaning of Article 263 TFEU (in the respective case were analysed the provisions of a Regulation). Even so, the Court held that (paragraph 38 of the *Unión de Pequeños Agricultores v Council of the European Union*) the European Union is a community based on the rule of law [after the Treaty of Lisbon – „ Union based on the rule of law"] in which its institutions are subject to judicial review, as a general principle of law which is part of the entirety of the fundamental rights.[7] Accordingly, the natural or legal persons have to enjoy the right to effective judicial protection, while the Member States – in the light of the principle of sincere cooperation – retain the obligation to establish all the possible measures to enable the exercise of the rights of the natural or legal persons (paragr. 41-44). In the case in question, Advocate General Jacobs[8] made an extensive analysis of the effective means that the natural or legal person may use to challenge the legal acts of the European Union, thus proposing a new (extended) interpretation of the concept of natural or legal person with an interest in bringing proceedings against the rules and regulations of the institutions, interpretation that was tacitly rejected by the judgement rendered in this case.[9]

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[4] C-361/09 P, Order of the Court (Fifth Chamber) of 5 February 2010 – Molter v Germany, [2010] ECR I-18*, Summ.pub., ECLI:EU:C:2010:63

[5] For an action against a member State for failure to correctly transpose a directive, see: C-540/10, *Transportes y Excavaciones J. Asensi SL v Kingdom of Spain*, Order of the Court (Eighth Chamber) of 10 March 2011, [2011] ECR I-25*, Summ.pub., EU:C:2011:145.

[6] C-50/00 P, Judgment of the Court of 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, [2002] ECR I-6677, EU:C:2002:462.

[7] However, that is not the case when a natural or legal person challenges the decision of a national court, qualified as action in annulment or claim for damages submitted by a natural person against a Member State (C-374/09 P, *Constantin Hârsulescu v Romania*, Order of the Court (Fifth Chamber) of 4 March 2010, [2010] ECR I-30*, Summ.pub., EU:C:2010:123; C-78/13 P, *Constantin Hârsulescu v Romania*, Order of the Court (Tenth Chamber) of 3 October 2013, EU:C:2013:653.

[8] C-50/00 P, Opinion of Advocate General Jacobs presented on 21 March 2002, paras 36-49.

[9] In another decision rendered by the General Court - T-241/97, Judgment of 17 February 2000, *Stork Amsterdam BV v Commission of the European Communities*, [2000] ECR II-309, EU:T:2000:41, paragraph 49 *et seq.* – the Court makes a differentiation between acts of the institutions (such as a decision) and the correspondence with the complainants (letter). Likewise, in Order of the Court of First Instance (First Chamber) of 22 June 2006, in case *Markku Sahlstedt and Others v Commission of the European Communities*, T-150/05,

Sometimes, even the Court's judgments tackle the use of the reference for a preliminary ruling – it is true that this use is at the discretion of the judge – in order to counterbalance the impossibility for the natural or legal person to challenge the effects of a directive.(Șandru, Banu și Călin, 2013)[10] In the order of dismissal of an action for annulment, the General Court[11] concluded that it is necessary for the natural or legal person to use - for the assessment of validity - the means of the plea of illegality or of the reference for a preliminary ruling.

In Case *Giersch and Others,*[12] the national court has submitted a reference for a preliminary ruling regarding the interpretation of the EU law after the initiation of the proceedings to establish the infringement of obligations, and, even though the Court of Justice did not address directly this issue prior to the rendering of the reasoned opinion, it may be considered that the initiation of the proceedings has direct consequences upon the interpretation of the EU law in the preliminary ruling.

In order to establish its jurisdiction, in an action submitted against the infringements of obligations by a Member State, the Court has made a parallel[13] to the reference for a preliminary ruling:

"*In relation to international conventions in general, it should be noted that, according to the case-law of the Court, if the Community is not a Contracting Party to a convention, in principle the Court is not competent to interpret the provisions of that convention in the context of preliminary proceedings*.

Specifically in relation to the 1957 Convention, it should be borne in mind that the Court has already held that it lacks jurisdiction to give a ruling on its interpretation, and on the obligations arising under it for the Member States since, despite the fact that that convention was linked to the Community and the functioning of its institutions, it was an

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[2006] ECR II-1851, EU:T:2006:172, the court points out that the way to challenge an act of EU law is by the means of a reference for a preliminary ruling (para 63).

[10] The Romanian courts have addressed no references for *for a preliminary ruling on validity* of the provisions of EU secondary law (directive, regulation, decision). See: (Șandru, et al., fără an). For examples on the dismissal of a reference for a preliminary ruling concerning the validity of an act of the EU, see in Mihai Șandru, Mihai Banu, Dragoș Călin, 2013, p. 143-144. Also, relative to an action concerning the provisions of Regulation 1973/2004 (Bucharest Court of Appeal, VIII[th] division, administrative and tax litigation, decision of 19 May 2010, not published) see (Șandru, et al., 2013). The preliminary references drafted by Romanian courts are published on the iaduer.ro platform. On the iaduer.ro platform are published also all the cases registered by the European Court of Justice regarding actions brought against the non-fulfilment of obligations by Romania.

[11] T-441/08, *ICO Services Ltd v European Parliament and Council of the European Union*, Order of the General Court (First Chamber) of 21 May 2010, [2010] ECR II-100*, Summ.pub., EU:T:2010:217, paragraph 67, where the Court makes reference to case C-50/00, previously mentioned.

[12] C-20/12, *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, Judgment of the Court (Fifth Chamber) of 20 June 2013, ECLI:EU:C:2013:411, paragraphs 2-3: „The request has been made in proceedings between the ministre de l'Enseignement supérieur et de la Recherche luxembourgeois (Luxembourg Minister for Higher Education and Research) ('the Minister') and students who have requested financial aid from the State for higher education studies in order to pursue such studies in a Member State other than the Grand Duchy of Luxembourg. In addition, the European Commission commenced, in April 2011, infringement proceedings against the Grand Duchy of Luxembourg, which remain at the pre-litigation stage. By reasoned opinion of 27 February 2012, the Commission requested that Member State to end discrimination against migrant workers and members of their families in relation to the grant of financial aid by the State for higher education studies, the grant of monthly assistance to young volunteers and the grant of so-called 'boni pour enfant' allowances."

[13] It should be remembered that EU law is interpreted by the Court of Justice in both types of proceedings.

international agreement concluded by the Member States which did not form an integral part of Community law (Case 44/84 Hurd [1986] ECR 29, paragraphs 20 to 22).

This assessment, as the Advocate General has pointed out in point 46 of his Opinion, does not have to be restricted to the procedural context in Hurd, where the Court was asked to give a preliminary ruling, but likewise applies in the context of the proceedings provided for in Article 226 EC, the subject-matter of which can only be a failure by a Member State to fulfil one of its obligations under the EC Treaty."[14]

2. TYPES OF ACTIONS BROUGHT AGAINST ROMANIA FOR BREACH OF OBLIGATIONS

Up to the present time, there is no "conviction" of Romania by the Court of Justice of the European Union. Even so, in the cases that we will further analyse, Romania has been ordered to pay the costs.[15]

2.1. Failure to transpose in due time – orders for removal from the Register

Case C-405/13, Commission v Romania, Order for removal from the Register of 17 October 2014 EU:C:2014:2356

The Commission asked the Court "to declare that by failing to adopt all the laws, regulations and administrative provisions necessary for the transposition of the provisions [...] of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, or in any event failing to notify such measures to the European Commission, Romania has failed to fulfil its obligations under Article 49(1) of the directive". Also, the Commission asked the Court to "order Romania, in accordance with Article 260(3) TFEU (the simplified proceedings for failure to fulfil an obligation, introduced by the Treaty of Lisbon) to pay a penalty of EUR 30 228,84 for each day of delay in complying with its obligation to communicate the measures necessary for the transposition of Directive 2009/72/EC, with effect from the day on which judgment is delivered in the present case." The period for the transposition of the directive into national law expired on 3 March 2011. The Commission pleaded for discontinuance and, by the order of 17/10/2014, the Court took note of this because "the action and the subsequent discontinuance of the Commission were the result of Romania's conduct, as a result of the fact that the latter has taken the necessary measures to comply with its obligations only after the action was brought before the Court." [16]

[14] C-132/09, *European Commission v Kingdom of Belgium*, Judgment of the Court (Third Chamber) of 30 September 2010, [2010] ECR I-8695, EU:C:2010:562, paragraphs 43-45.

[15] The Court has carried into effect the provisions of Article 141(2) of the Rules of Procedure „*However, at the request of the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party*". (Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013)).

[16] C-405/13, *Commission v Romania*, Order for removal from the Register of 17 October 2014, EU:C:2014:2356.

Case C-406/13, Commission v Romania, Order for removal from the Register of 11 November 2014, **EU:C:2014:2396**.

The Commission asked the Court "to declare that by failing to adopt all the laws, regulations and administrative provisions necessary for the transposition of the provisions [...] of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, or in any event failing to notify such measures to the European Commission, Romania has failed to fulfil its obligations under Article 54(1) of the directive." Also, the Commission asked the Court to "order Romania, in accordance with Article 260(3) TFEU, to pay a penalty of EUR 30 228,84 for each day of delay in complying with its obligation to communicate the measures necessary for the transposition of Directive 2009/73/EC, with effect from the day on which judgment is delivered in the present case." The period for the transposition of the directive into national law expired on 3 March 2011. The Commission pleaded for discontinuance and, by the order of 11/11/2014, the Court took note of this because "the action and the subsequent discontinuance of the Commission were the result of Romania's conduct, as a result of the fact that the latter has taken the necessary measures to comply with its obligations only after the action was brought before the Court." [17]

Both Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, which were the subject-matter of case C-405/13 and case C-406/13, have been transposed into national law by Law no. 127 of 2014.[18]

The issue that has to be taken into consideration here is that existed the possibility to withdraw the action as ECJ could have in fact established the infringements of obligations by Romania, fact that occurred at the time that the action was brought before ECJ by the Commission.

The "policy" of the last moment transposition, namely after the period for transposition has expired, may have effects that lead to the "conviction" of a Member State. For example, in the previously mentioned situation, the legislative intervention was mandatory; this kind of intervention excluded the issuance of an ordinance by the Government (either a simple or emergency ordinance) as this way of action would have been unconstitutional. The Senate, as the first Chamber seised with this matter, has rejected the bill of law, while in the Chamber of Deputies, which has the last word on the matter, the bill was debated and even postponed initially in the plenary, being sent back to

[17] C-406/13, *Commission v Romania*, Order for removal from the Register of 11 November 2014, EU:C:2014: 2396.

[18] *Law no. 127 of 2014 modifying and amending the Law on electrical energy and natural gas no. 123 of 2012 and the Law on petrol no. 238 of 2004, published in the Official Gazette no. 720 of 01.10.2014. Further details concerning the way the directive was transposed after the action brought by the Commission may be found in the statement of reasons, available at http://www.cdep.ro/proiecte/2014/300/60/9/em571.pdf, last accessed on 5 May 2015.*

the Standing Committee for Industry and Services so that the latter to draft up an additional report on the bill.[19]

In a recent case it is emphasized the fact that only the Court of Justice has jurisdiction to establish whether a State has breached the EU law by not transposing a directive and to impose penalties.[20]

In a decision from 2002, the Court of Justice ordered a Member State to pay both a lump sum as well as penalties:[21]

"Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it." (Banu, 2005)

In another recent case – which relates to Article 260(2) TFEU – the Court held that "*an order to pay a lump sum is based essentially on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations*"[22]. The Court ordered the Czech Republic to pay a lump sum, without the penalties.

As noted in recent studies, there can be no precise determination of the period in which the Court of Justice renders a judgement; therefore an ECJ's decision may be issued in a period that is shorter than the average period, thus leaving the State without the possibility to adopt a national provision by the means of which it fulfils its obligation under EU law; in either situation, the State is still culpable for the inobservance of the established period for transposition and for the infringements of obligations (Panke, 2007).[23]

2.2. Non-compliance with the European Union Law

Case C-104/15, Commission v Romania[24]

In case C-104/15, Commission v Romania, the petition on the observance of the European rules represents a first test that enables the examination of a State's liability,

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[19] See: Chamber of Deputies, bill tracking http://www.cdep.ro/pls/proiecte/uplpck2015.proiect?cam=2&_idp=14300.

[20] ECJ, C-292/11 P, *European Commission v Portuguese Republic*, Judgment of the Court (Grand Chamber) of 15 January 2014, EU:C:2014:3 (whereby the appeal of the Commission brought against the Judgment of the General Court (Third Chamber) of 29 March 2011 is being dismissed, case T-33/09, *Portuguese Republic v European Commission*, [2011] ECR II-1429, EU:T:2011:127).

[21] ECJ, Grand Chamber, C–304/02, Judgment of 12 July 2005, *Commission of the European Communities v French Republic*, [2005] ECR I-6263, EU:C:2005:444, the translation into Romanian is available in RRDC, no. 3/2005.

[22] C-241/11, European Commission v Czech Republic, Judgment of the Court (Grand Chamber) of 25 June 2013., ECLI:EU:C:2013:423, paragraph 40.

[23] available online at: http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2007-4_Panke.pdf

[24] ECJ, C-104/15, *Commission v Romania*, pending.

which is independent from the actions of the authorities or persons involved. The action was brought on 3 March 2015 by the European Commission which asked the Court of Justice to declare that "by not adopting the necessary measures to prevent pollution from dust particles coming from the Bosneag pond extension belonging to the copper and zinc mining operations of Moldomin at Moldova Noua, Romania has failed to fulfil its obligations under Article 4[25] and Article 13(2)[26] of Directive 2006/12/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC"

The action brought by the Commission against Romania relates to "the failure by the Romanian authorities to adopt the measures necessary to prevent pollution from dust particles coming from one of the ponds of a copper mining operation". "The Commission submits that, by not adopting the measures necessary to prevent the spread of dust particles from the surface of the Bosneag pond extension, which damage human health and the environment, Romania has not complied with Article 4 and Article 13(2) of Directive 2006/21/EC. The Commission considers that Romania must ensure the protection of human health and the environment from any negative effect whatsoever — even though it enjoys a certain degree of flexibility as to the specific measures that it must adopt — if the requirements defined in Article 4 of Directive 2006/21/EC are to be respected. The Commission also considers that Article 13(2) of the Directive imposes a specific obligation on the competent authority, that is to say, that authority must ensure that the operator takes adequate measures to prevent or reduce the dust. The Commission relies in these proceedings on the report of the competent Romanian authority for environmental protection, on information from the press and on the responses provided by Romania in the pre-litigation proceedings, all of which go to show that, in the area of Moldova Noua, there is significant pollution from dust coming from the Bosneag pond extension which, particularly at times when the wind is stronger, has a harmful effect on the health of the local inhabitants and the environment. Furthermore, the Commission argues that Romania cannot rely on purely internal circumstances, such as the privatisation of Moldomin and the future environmental obligations of a buyer, in order to justify non-fulfilment of the obligations under the directive."[27]

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[25] *Article 4* – "General requirements" – has the following text:
"1. Member States shall take the necessary measures to ensure that extractive waste is managed without endangering human health and without using processes or methods which could harm the environment, and in particular without risk to water, air, soil and fauna and flora, without causing a nuisance through noise or odours and without adversely affecting the landscape or places of special interest. Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled depositing of extractive waste.
2. Member States shall ensure that the operator takes all measures necessary to prevent or reduce as far as possible any adverse effects on the environment and human health brought about as a result of the management of extractive waste. This includes the management of any waste facility, also after its closure, and the prevention of major accidents involving that facility and the limiting of their consequences for the environment and human health.
3. The measures referred to in paragraph 2 shall be based, inter alia, on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the waste facility, its geographical location and the local environmental conditions."

[26] Article 13(2) – "Prevention of water status deterioration, air and soil pollution": „*The competent authority shall ensure that the operator has taken adequate measures to prevent or reduce dust and gas emissions.*"

[27] The arguments of the Commission in case C-104/15, Commission v Romania, pending.

2.3. The action of the Commission dismissed on grounds of irregularity of the pre-litigation procedure

Case C-522/09, Commission v Romania, Judgment of 14 April 2011, [2011] ECR I-2963, EU:C:2011:251.[28]

In this case, the Court has analysed whether the European Commission has complied with the procedure, without addressing any further the substance of the action.

"15 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the complaints formulated by the Commission (see, inter alia, Case C‑147/03 Commission v Austria [2005] ECR I‑5969, paragraph 22 and the case-law cited).

16 The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the FEU Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations (see, inter alia, Case 211/81 Commission v Denmark [1982] ECR 4547, paragraph 9).

17 In the present case, it is clear that, by its letter of formal notice, the Commission essentially complained that Romania had not communicated to it the national list of SPAs, and that it relies on this complaint to infer, in very general terms, a failure on the part of Romania to fulfil its obligation to classify suitable SPAs for the purposes of Article 4(1) and (2) of the Birds Directive.

18 Also, on 21 December 2007, less than two months after receiving the letter of formal notice, Romania forwarded to the Commission the national list of the SPAs that it had classified in the meantime, a list which shows that a significant number of SPAs were classified by Romania pursuant to Article 4(1) and (2) of the Birds Directive. Nevertheless, in a reasoned opinion issued on 23 September 2008 the Commission complained, relying on detailed arguments, that the SPAs classified by Romania were insufficient in number and size in light of Article 4(1) and (2) of the Birds Directive, without first having given Romania the opportunity to put forward its observations in that regard.

19 Such a situation is therefore clearly distinguishable from the situation, invoked by the Commission, that gave rise to the judgment in Commission v Luxembourg. In that case, the Grand Duchy of Luxembourg had failed to mention any measure transposing the directive in question in the course of the pre-litigation procedure and had merely let it be understood that the measures necessary for implementation were about to be adopted. It was not until after the Commission brought proceedings before the Court that the Grand Duchy of Luxembourg submitted, in its defence, that a law transposing the directive in question correctly had been adopted. In such circumstances, the Court has held that, if the pre-litigation procedure attained its objective of protecting the rights of the Member State concerned, the latter cannot complain that the Commission has extended or altered the subject-matter of the action as defined by the pre-litigation procedure on the ground that

[28] C-522/09, *European Commission v Roumanie*, Judgment of the Court (Fourth Chamber) of 14 April 2011, [2011] ECR I-2963, EU:C:2011:251. See also: (Aubert, et al., 2011)

the Commission, after alleging a failure by the Member State to transpose a directive, has specified in its reply that the implementation pleaded for the first time by the Member State concerned in its defence is incorrect or incomplete so far as certain provisions of the directive are concerned (Commission v Luxembourg, paragraphs 54 to 56).

20 In light of the foregoing it must therefore be found that the letter of formal notice did not identify sufficiently the failure to fulfil obligations of which Romania was subsequently accused in the reasoned opinion and that the pre-litigation procedure did not attain its objective of guaranteeing the right of the Member State concerned to submit its observations against the complaints formulated by the Commission, so that the action must be held inadmissible."

3. CONCLUSIONS

Infringement proceedings provided for by the Treaties of the European Union have not yet been used at full by or against Romania. The research aims to provide an analytic description of the legal framework, of the pending proceedings and of the effects that completed cases have on Romanian law.

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