

Director disqualification orders in competition cases

an OFT guidance document

IMPORTANT UPDATE

The CMA is currently revising its guidance, Director disqualification orders in competition cases OFT510, and envisages publishing draft guidance and a public consultation shortly. Since the guidance was published The Section 16 Enterprise Act 2002 Regulations 2015 have come into force. These Regulations enable the CMA and other parties to ask the High Court to transfer a dispute about the competition element of a disqualification case to the Competition Appeal Tribunal; that will have the effect that it will be possible for all disputes about an infringement decision – those arising in a disqualification case and those in an appeal against the infringement decision or the financial penalty - to be decided by the CAT at the same time or close together, which would have important procedural and costs benefits for all parties. For this to be practically feasible, the CMA would have to issue disqualification proceedings earlier than is provided for under paragraph 4.10 of this guidance. Consequently, the CMA is now withdrawing paragraph 4.10 of the guidance with effect from 4 June 2018 pending the public consultation and publication of the final revised guidance.

The rest of the current guidance remains in place to provide an overview of the CMA's general approach to director disqualification. However, it is important to note that the CMA will consult on broader changes to the existing guidance than merely the removal of paragraph 4.10 and there will be an opportunity to comment on all such changes at that stage. Further updates will be published on the CMA's website.

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1 Introduction

- 1.1 This guidance explains the powers of the Office of Fair Trading (OFT) and each specified regulator¹ (Regulator) under the Competition Disqualification Order (CDO) provisions of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002, (CDDA).² The guidance does not offer any commentary on the court procedure relating to CDOs, nor does it speculate as to when a court may decide to make a CDO.
- 1.2 The OFT and Regulators are committed to transparency and wish to explain the general approach they intend to take to CDOs. This guidance is particularly aimed at company directors, their professional advisers and relevant professional associations. They do, however, hope that interested businesses and consumers more generally will also find this guidance useful.
- 1.3 Chapter 2 of this guidance discusses the statutory basis of CDOs. Chapter 3 outlines the statutory basis for Competition Disqualification Undertakings (CDUs). Chapter 4 sets out the factors which the OFT or Regulator will take into consideration when deciding whether or not to apply for a CDO. Chapter 5 outlines the procedure which the OFT or Regulator will follow before applying to the court for a CDO.

¹ For these purposes each of the following is a 'specified regulator': the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; and the Civil Aviation Authority. See section 9E(2) CDDA.

² Sections 9A to 9E CDDA.

2 Competition disqualification orders

- 2.1 Under the CDDA, the court **must** make a CDO against a person if the court considers that the following two conditions are satisfied in relation to that person:
- (1) an undertaking which is a company of which that person is a director commits a breach of competition law, **and**
 - (2) the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company.³
- '(1) an undertaking which is a company of which that person is a director commits a breach of competition law'**
- 2.2 An 'undertaking' for the purposes of section 9A of the CDDA has the same meaning as it does for the purposes of the Competition Act 1998 (CA98) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁴ An undertaking includes any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status.⁵ It follows that a sole trader, partnership, company or a group of companies can each be an undertaking.
- 2.3 A CDO can only be made against a **director⁶ of a company**. The OFT and Regulators consider that 'director' for these purposes includes a de facto director.⁷ 'Company' includes unregistered companies.⁸
- 2.4 'Breach of competition law' for the purposes of section 9A CDDA means an infringement of **any** of the following:
- the Chapter I prohibition of CA98
 - the Chapter II prohibition of CA98
 - Article 101 of the TFEU (formerly Article 81 EC Treaty)
 - Article 102 of the TFEU (formerly Article 82 EC Treaty).
- 2.5 The Chapter I prohibition is established by section 2(1) of CA98 and provides that:
- '...agreements between undertakings, decisions by associations of undertakings or concerted practices which:
- (a) may affect trade within the United Kingdom, and
 - (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom are prohibited...'

2.6 The Chapter II prohibition is established by section 18 of CA98 and provides that:
'...any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.'⁹

2.7 Article 101 of the TFEU provides that:

'(1)The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...'

2.8 Article 102 of the TFEU provides that:

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.'

'(2) the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company'

2.9 When deciding whether the second condition above is satisfied in relation to that person, the court:

- **must** have regard to whether:
 - his conduct contributed to the breach of competition law¹⁰
 - his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it
 - he did not know but ought to have known that the conduct of the undertaking constituted the breach
- **may** have regard to his conduct as a director of a company in connection with any other breach of competition law¹¹
- **must not** have regard to any of the matters specified in Schedule 1 of the CDDA.¹²

3 Sections 9A(1) to (3) CDDA.

4 Section 9A(11) CDDA.

5 Further guidance on the meaning of 'undertaking' can be found in the Competition Act guideline '*Agreements and Concerted Practices*' (OFT401).

- 2.10 The maximum period of disqualification under a CDO is 15 years.¹³ During the period in which a person is subject to a CDO it is a criminal offence¹⁴ for him to:
- be a director of a company
 - act as a receiver of a company's property
 - in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, or
 - act as an insolvency practitioner.¹⁵
- 2.11 In addition, any person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company.¹⁶ Furthermore, details of a CDO will be entered into a public register maintained by the Secretary of State.¹⁷ The Secretary of State or OFT may also issue a press release.

6 'Director' includes any person occupying the position of director, by whatever name called (section 22(4) CDDA); for these purposes 'director' includes a shadow director (section 9E(5) CDDA). A shadow director is any person in accordance with whose directions or instructions the directors of a company are accustomed to act (section 22(5) CDDA). Note that a person shall not be deemed to be a shadow director by reason only that the directors act on the advice given by that person in a professional capacity (section 22(5) CDDA). See also the comments of Millet J in **Re Hydrodam (Corby) Ltd** [1994] 2 BCLC 180 at 183 and the Court of Appeal in **Secretary of State for Trade and Industry v Deverell** [2000] 2 All ER 365.

7 Defined by Millet J in **Re Hydrodam (Corby) Ltd** (cited at footnote 6 above) as '... a person who assumes to act as a director'. A de facto directorship will generally be regarded as being mutually exclusive of shadow directorship.

8 Section 22(2)(b) CDDA. For a definition of unregistered companies, see section 220 of the Insolvency Act 1986. 'Unregistered companies' may include companies registered outside of Great Britain – see, e.g. **Re a Company (No 007946 of 1993)** [1994] Ch 198 and **Re Normandy Marketing Ltd** [1993] BCC 879. Furthermore, references to a company in the CDDA include references to a limited liability partnership – see Regulation 4(2)(a) of the Limited Liability Partnership Regulations 2001 (SI 2001/1090).

9 Further guidance on the scope of the prohibitions can be found in the Competition Act guidelines '*Agreements and Concerted Practices*' (OFT401) and '*Abuse of a Dominant Position*' (OFT402).

10 See paragraph 2.4 above for 'breach of competition law'.

11 See paragraph 2.4 above for 'breach of competition law'.

12 Sections 9A(5) and (6) CDDA. Schedule 1 CDDA specifies matters to be considered when determining unfitness of directors in non-CDO cases.

13 Section 9A(9) CDDA.

14 Section 13 CDDA. Unless, with respect to the categories in the first three bullet points below only, that person has the permission of the court (section 1(1)(a) CDDA).

15 Section 1(1) CDDA.

16 Section 15(1)(a) CDDA. Similarly, a person involved in the management of a company who acts or is willing to act on instructions given without leave of the court by a person whom he or she knows at that time to be the subject of a CDO will also be personally liable for all of the relevant debts of the company (section 15(1)(b) CDDA).

17 Section 18 CDDA.

3 Competition disqualification undertakings

- 3.1 The OFT or Regulator may accept a Competition Disqualification Undertaking (CDU) from a person **instead** of applying for a CDO or, where a CDO has been applied for, **instead** of continuing with the application for a CDO.¹⁸
- 3.2 A CDU is an undertaking by a person that for the period specified in the undertaking he or she will not:
- be a director of a company
 - act as a receiver of a company's property
 - in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, or
 - act as an insolvency practitioner.¹⁹
- 3.3 The maximum period which may be specified in a CDU is 15 years.²⁰ Breach of a CDU has the same consequences as a breach of a CDO.²¹ Furthermore, details of a CDU will be entered into a public register maintained by the Secretary of State.²² The Secretary of State or OFT may also issue a press release.
- 3.4 The OFT or Regulator will give very serious consideration to a CDU offered in response to a section 9C notice.²³ Whether or not such an offer will be accepted by the OFT or Regulator will depend upon the period of disqualification offered and the facts of the case.
- 3.5 The period of a CDU must be proportionate to the seriousness of the case against the director, taking account of any aggravating or mitigating factors.

¹⁸ Section 9B(2) CDDA.

¹⁹ Section 9B(3) CDDA. However, a CDU may provide that the prohibition covering the categories in the first three bullet points not apply if the person first obtains the permission of the court.

²⁰ Section 9B(5) CDDA.

²¹ Sections 13 and 15 CDDA. See also paragraph 2.11 above.

²² Section 18 CDDA.

²³ See paragraph 5.1 and following.

4 Applications for competition disqualification orders

- 4.1 The OFT and Regulators have the power to apply to the court²⁴ for a CDO against a person.²⁵ In deciding whether to apply to the court for a CDO the OFT or Regulator will consider the factors below.

Factors for consideration

- 4.2 The OFT or Regulator will follow a five-step process when deciding whether to apply for a CDO. It will:

- (1) consider whether there has been a breach of competition law
- (2) consider the nature of the breach and whether a financial penalty has been imposed
- (3) consider whether the company in question benefited from leniency
- (4) consider the extent of the director's responsibility for the breach of competition law, and
- (5) have regard to any aggravating and mitigating factors.

- 4.3 To help it consider these factors, the OFT or Regulator may use any or all of the information-gathering powers in sections 26 to 28 of CA98.²⁶

Directors and officers of parent and subsidiary companies

- 4.4 As noted at paragraph 2.2 above, an undertaking may in some cases constitute a group of companies (treated for the purposes of competition law as a 'single economic entity'). In certain circumstances, such as where a subsidiary has no real independence from its parent, a parent company may be held responsible for a breach by one or more of its subsidiaries on the basis that they form a single economic entity. In such cases, for the purposes of CDOs, the OFT or Regulator will first consider which company or companies in the corporate group directly committed the breach of competition law. Applications for CDOs will then be considered against the directors of those companies using the five-step process discussed above at paragraph 4.2.

²⁴ In England and Wales 'court' means the High Court. In Scotland 'court' means the Court of Session (section 9E(3) CDDA).

²⁵ Section 9A(10) CDDA.

4.5 The directors or officers of a parent company may not have been formally appointed as directors of a subsidiary company pursuant to the subsidiary's articles of association. Where this is the case, the OFT or Regulator will consider whether any of the directors or officers of the parent company are de facto or shadow directors of the subsidiary. Where such a person is a de facto or shadow director of the subsidiary, the OFT or Regulator will consider whether to apply for a CDO against that person, using the five-step process discussed above at paragraph 4.2.

Step one – Breach of competition law

4.6 The first question the OFT or Regulator will consider is whether a company of which the person is a director (and which is an undertaking) has committed a breach of competition law.²⁷ In doing so the OFT or Regulator will first consider whether the breach of competition law has been proven in a decision or judgment (as the case may be) of:

- the OFT or a Regulator²⁸
- the European Commission
- the Competition Appeal Tribunal
- the European Court²⁹, or
- any other competent court.

4.7 There may be exceptional cases where there is no prior decision or judgment but the OFT or Regulator nevertheless believes it is appropriate to apply for a CDO. In such cases (as in all CDO cases) the OFT or Regulator would still have to satisfy the court that there had been an infringement of competition law.

4.8 In respect of breaches proven in a European Commission decision or a judgment of the European Court, it is not the intention of the OFT or Regulator to apply for CDOs where the breach to which the decision or judgment relates does not, or did not, have an actual or potential impact in the United Kingdom.

4.9 The OFT or Regulator will not apply for CDOs in respect of breaches of competition law which ended before the commencement of sections 9A to 9E CDDA. CDO applications may be made in relation to breaches which started before the commencement of sections 9A to 9E CDDA (20 June 2003), but which continued after that date.

4.10 [DELETED]*

²⁶ Sections 9C(1) and 9C(2) CDDA. See the Competition Act guideline '*Powers of Investigation*' (OFT404) for more detail on sections 26 to 28 CA98.

*This paragraph has been removed. See the statement on front page.

Step two – Nature of the breach

- 4.11 The next matter which the OFT or Regulator will take into account is the nature of the breach of competition law. The OFT or Regulator is more likely to consider CDO applications to be appropriate in cases involving more serious breaches, such as those in which a financial penalty has been imposed (and, in the event of an appeal, upheld in whole or part) or would have been imposed save for the application of section 39 or 40 CA98 and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000.³⁰

Step three – Immunity and leniency

- 4.12 The next question which the OFT or Regulator will consider is whether the company of which a person is a director benefited from leniency. 'Leniency' for these purposes means the immunity from, or any reduction in, financial penalty in the manner described in the *OFT's Guidance as to the Appropriate Amount of a Penalty* (the Penalties Guidance) or that described in the European Commission Notice on *Immunity from Fines and Reduction of Fines in Cartel Cases*³¹, or any publications replacing them. 'Reduction' for these purposes does not mean a reduction in the amount of financial penalty imposed for a breach owing to the application of any mitigating factors or circumstances discussed in the Penalties Guidance or the European Commission Guidelines on the *Method of Setting Fines*³², or to the application of a settlement or early resolution discount. (See also paragraph 4.29 below with respect to no-action letters in cartel cases.)
- 4.13 The OFT or Regulator will **not** apply for a CDO against any current director of a company whose company benefited from leniency in respect of the activities to which the grant of leniency relates.³³ Companies benefiting from leniency will receive confirmation of this policy.
- 4.14 However, the OFT or Regulator may consider applying for a CDO against:
- a director who has at any time been removed or otherwise ceases to act as a director of a company owing to his role in the breach of competition law in question and/or for opposing the relevant application for leniency, or
 - a director who fails to co-operate with the leniency process – that is, a director who fails to maintain continuous and complete co-operation throughout the OFT's or Regulator's investigation (including any criminal investigation by

27 See paragraph 2.4 above for 'breach of competition law'.

28 See paragraph 1.1 for the definition of 'Regulator'.

29 The European Court comprises the Court of Justice and the General Court.

30 SI 2000/262.

the OFT) and until the conclusion of any action taken by the OFT or Regulator as a result of its investigation³⁴ irrespective of whether the relevant company has been granted immunity or leniency by the OFT, a Regulator or the European Commission.

- 4.15 In order to minimise the risk of a CDO application being made against them, company directors whose companies have been involved in cartel activities should therefore seek to ensure that their companies approach the OFT, a Regulator or the European Commission for leniency.

Step four – Extent of the director’s responsibility for the breach

- 4.16 The next step in the OFT’s or Regulator’s assessment is to consider the extent of the director’s responsibility for, or involvement in, the breach, whether by action or omission, in order to assess whether the director is unfit to be concerned in the management of a company.
- 4.17 In all cases the OFT or Regulator will consider whether:
- the director’s conduct contributed to the breach of competition law
 - the director’s conduct did not contribute to the breach of competition law but he had reasonable grounds to suspect that the undertaking’s conduct constituted the breach and took no steps to prevent it, or
 - the director did not know but ought to have known that the undertaking’s conduct constituted the breach.
- 4.18 Where the OFT or Regulator finds sufficient evidence of conduct falling into one or more of these categories, it is likely to apply for a CDO.

Director’s conduct contributed to the breach

- 4.19 The OFT or Regulator will consider whether there is evidence indicating that a director’s conduct contributed to the breach, including (but not limited to) evidence of the director, either alone or with other persons, having:
- actively taken steps to carry out the infringement (for example, by drawing up a list of the company’s prices and sending them to a competitor, to enable them to align their prices, or implementing a predatory pricing strategy)
 - planned, devised, approved or encouraged the activity of the undertaking which caused the breach
 - ordered, pressured or encouraged those identified as having a direct or indirect role in the breach to engage in the activity causing the breach

³¹ OJ 2006 C298/11

³² OJ 2006 C210/02

³³ A CDO application may still be made against a director in respect of any breach of competition law to which the grant of leniency does **not** relate. Company directors should therefore ensure that a request for leniency is made in respect of **all** cartel activity in which their company is, or has been, involved.

- attended meetings (internal or external) in which the activity constituting the breach either occurred or was discussed, or both
- directed, ordered, pressured or encouraged staff of the undertaking to attend meetings (internal or external) for the purpose of participating in or discussing the activity constituting the breach, or
- ordered, encouraged or advocated retaliation against other undertakings who were reluctant to, or refused to, participate in the activity constituting the breach of competition law.

4.20 The key consideration is whether the director had an active role in causing his company to carry out or agree to carry out the activity constituting the breach.

Reasonable grounds to suspect breach but took no steps to prevent it

4.21 Where there is no evidence that the director's conduct contributed directly to the breach, the OFT or Regulator may consider whether there is evidence that he had reasonable grounds to suspect that the undertaking's conduct constituted the breach and took no steps to prevent it, for example:

- the director had reasonable grounds to suspect (or knew) that persons within the company were directly or indirectly involved in the conduct which constituted a breach, but failed to take reasonable steps to stop the activity in question, or
- the director authorised or approved expenditure of funds used to finance any activity relating to the breach, having reasonable grounds to suspect (or knowing) that those funds would be used for the activity and that the activity related to a breach.

Ought to have known of the breach

4.22 When considering whether a director did not know but ought to have known that his company was involved in the breach, the OFT or Regulator is likely to consider, among other things, the following factors:

- the director's role in the company, including his specific position and responsibilities
- the relationship of the director's role to those responsible for the breach
- the general knowledge, skill and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position, and/or
- the information relating to the breach which was available to the director.

³⁴ An explanation of the requirement to maintain continuous and complete co-operation is set out in the OFT guidance *Leniency and No-action* (OFT803).

4.23 While the OFT and Regulators do not expect that directors should have specific expertise in competition law, they do expect that all company directors should appreciate the importance of competition law compliance. Furthermore, the OFT and Regulators expect that every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law. However, the fact that a director is responsible for ensuring competition law compliance within a company will not itself expose that director to an increased risk of CDO proceedings should a breach of competition law occur, or create a presumption that the director ought to have known about any breach that occurs. The OFT and Regulators will also take into account the actions taken by such a director to create a compliance culture and to avoid breaches of competition law occurring.

Step 5 – Aggravating and mitigating factors

4.24 The final step which the OFT or Regulator will consider when deciding whether to apply for a CDO against a director is whether any aggravating or mitigating factors (or both) apply. Aggravating factors increase the likelihood that the OFT or Regulator will apply for a CDO. Conversely, the presence of mitigating factors may reduce the likelihood that an application for a CDO will be made.

Aggravating factors

4.25 Aggravating factors include evidence that the director:

- had been directly or indirectly involved in breaches of competition law in the past
- destroyed or advised others to destroy any records relating to any breach of competition law with the objective of concealing the breach
- obstructed or impeded any investigation by the OFT, a Regulator or the European Commission into any breach of competition law or attempted to do so or advised others to do so
- during any investigation of a breach of competition law, unlawfully refused or advised refusing access to investigators from the OFT, a Regulator or the European Commission to any part of the undertaking's premises
- ordered, encouraged or advocated continued participation in the breach following commencement of an investigation into the breach by the OFT, a Regulator or the European Commission.

³⁵ Pressure to meet sales or profitability targets will not, however, be a mitigating factor for these purposes.

³⁶ Including a magistrates' court.

Mitigating factors

- 4.26 Mitigating factors include evidence indicating that:
- the undertaking committed the breach as a result of coercion by another undertaking (for example, where the breach was committed as the only perceived way to avoid threatened retaliation by a dominant undertaking)
 - there was genuine uncertainty prior to the breach as to whether the infringing activity constituted a breach
 - the director contributed to the company taking quick remedial steps when the breach was brought to his or her attention, including the implementation or revision of a competition law compliance programme
 - the director took disciplinary action against the employees responsible for the breach
 - the director was himself or herself under severe internal pressure (such as from controlling shareholders of the company or directors of a parent company) either to be involved in the breach or to allow it to occur.³⁵

Cartel offence: conviction/no-action letters

- 4.27 Any court³⁶ by or before which an individual is convicted of an indictable offence (whether tried on indictment or summarily) committed in connection with the management of a company may make a disqualification order against that individual.³⁷
- 4.28 Where a company director has been convicted of the cartel offence under section 188 Enterprise Act 2002 and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director.³⁸ The OFT and Regulators take the view that the court by or before which the director is convicted is the most appropriate venue for consideration of a disqualification order, so they would not expect to use their powers under section 9A CDDA in these circumstances.
- 4.29 The OFT or Regulator will **not** apply for a CDO against **any** beneficiary of a no-action letter in respect of the cartel activities specified in that letter.³⁹ Recipients of no-action letters will receive individual confirmation of this policy.

³⁷ Sections 2(1) and 2(2)(b) CDDA.

³⁸ This is because the cartel offence is an indictable offence (section 190 Enterprise Act 2002).

³⁹ A no-action letter is a letter sent by the OFT to a person stating that they will not face criminal prosecution for cartel activities specified in the letter. See the OFT guidance '*The cartel offence: guidance on the issue of no-action letters for individuals*' (OFT513).

5 Procedure

- 5.1 Before making an application for a CDO against a person, the OFT or Regulator will give notice to the person likely to be affected by the application (a 'section 9C notice').
- 5.2 The section 9C notice will include the following information:
- that the OFT or Regulator proposes to apply for a CDO against that person
 - the consequences for that person of a CDO being made against him or her
 - the grounds for the proposed application
 - the evidence which the OFT or Regulator intends to submit to the court in support of its proposed application
 - that the OFT or Regulator will, if requested, allow that person to have access to the file concerning the proposed application (subject to any confidentiality excisions to the file)
 - that the person has the right to make written and, if requested, oral representations prior to the OFT or Regulator making the proposed application⁴⁰
 - a deadline by which that person should submit written representations and a deadline for indicating to the OFT or Regulator whether that person wishes to make oral representations
 - that if the person has not submitted written representations or requested an opportunity to make oral representations by the relevant deadline(s), an application for CDO may be made forthwith
 - that the person's representations may be prepared or made by a legal advisor
 - that the person may wish to offer the OFT or Regulator a CDU, which, if accepted by the OFT or Regulator, would mean that the OFT or Regulator would not make the application for a CDO
 - an indication of the length of a CDU that is likely to be accepted by the OFT or Regulator in respect of that person

⁴⁰ The OFT or Regulator is required to allow the person an opportunity to make representations (section 9C(4)(b) CDDA).

- an indication of the costs incurred by the OFT or Regulator in the relevant proceedings to date and an assurance that, if a CDU offered by that person is accepted by the OFT or Regulator, the OFT or Regulator will not usually seek to recover any costs from that person, and
- a statement that once a CDO application has been made to the court, the award of costs will be at the discretion of the court and the court will usually award costs against the unsuccessful party.

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