



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

ENCJ WORKING GROUP

Mutual Confidence 2009-2010 Report and Recommendations



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1. Introduction

The ENCJ Mutual Confidence working group met on 27 October 2009 and 1 February 2010 at the ENCJ premises (list of participants attached). The meetings were chaired by John Thomas, coordinator of the working group. The working group decided to look at specific ways of strengthening mutual confidence. Mutual confidence between judges in the different Member states is the basis for efficient cooperation in the area of Freedom, Security and Justice. The assignment for this working group was to consider what can be done to ensure this trust and how to develop new ways to increase the mutual understanding between the different systems and its judges. The working group decided that it should concentrate on the topics of evaluation (§2), judicial training (§3) and means to strengthen existing judicial networks and to create new links between the networks (§4). A questionnaire was drafted and sent to the Members and Observers to learn about the current practices in these fields in the various judiciaries. In §5 the recommendations of the working group are summed up and in § 6 the proposals for future action by the ENCJ are indicated.

2. Evaluation

2.1 The Lisbon Treaty and the Stockholm Programme

The Lisbon Treaty aims to create a more open, efficient and democratic Europe. To that end it *inter alia* provides that Member States, in cooperation with the Commission, shall undertake an objective and impartial evaluation of the implementation of policies in the area of justice, in particular to promote the full application of the principle of mutual recognition. The Council of the European Union concluded in 2007¹ that ‘existing evaluation mechanisms are capable of improvement’. Besides improving and strengthening existing evaluations, the Dutch, German and French governments are proposing to set up an **additional evaluation** mechanism, in the field of EU judicial cooperation in criminal matters. This mechanism should move beyond mere evaluation of implementation. The Stockholm Programme reiterates the importance of evaluation to promote the full application of the principle of mutual recognition².

A representative of the Dutch Ministry of Justice, Mr Jan Terstegen, director of European and International Affairs, attended the meeting on 27 October 2009. He gave the working group an overview of the developments on the issue of evaluation. The Dutch, French and German proposal aims at developing an additional evaluation mechanism which should focus thematically on selected aspects of national justice systems that have repeatedly been found to be obstacles to cooperation and to the application of existing mutual recognition instruments in criminal matters in the European judicial area. Mr Terstegen explained the **what, how and who** concerning this evaluation mechanism.

As to **what** would be evaluated the following areas have been identified:

- Conditions and enforcement of provisional detention and (length) of custodial sentences
- Hours spent in custody in European Arrest Warrant (EAW) procedures
- The length of proceedings
- The way Member States organise their criminal law system and the way they handle EAW requests
- The proportionality of EAW requests.
- Legal remedies available for the implementation of Mutual Recognition instruments in the issuing and the executing State.

¹ Council of the European Union, Council Conclusions – Evaluation of EU policies on Freedom, Security and Justice, Doc. 10893/1/07, 19 June 2007

² Paragraph 1.2.5 of the Stockholm Programme, Council of the European Union 2/12/2009 17024/09

As to **how** the evaluation should be organised a multilateral approach is foreseen. The evaluation mechanism should not focus on the fact that standards are not met, but on the reason why they were not met. The evaluation in itself will not entail fact finding. Fact finding will be done through other mechanisms such as the European Committee for the Prevention of Torture.³ A voluntary pilot project is envisaged. The first step in this project will be to organise an inventory on what information and instruments are available in the identified fields.

As to **who** should carry out the evaluation a Board could be composed that would have general oversight. This Board would consist of representatives of the judiciary, prosecutors, The European Commission, the European Parliament etc. Working groups would be set up for the separate issues that would be evaluated.

The ENCJ working group stressed that if such an evaluation mechanism would be set up the ENCJ and an organisation of prosecutors should be involved. Whenever evaluation involves issues related to the judiciary, judges should be involved. In general the working group agrees that the mere existence of an evaluation mechanism could strengthen the trust in the different judicial systems.

2.2 The monitoring and evaluation mechanism of the CPT

At the meeting on 1 February Mr Mauro Palma, President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) – Council of Europe, spoke to the working group on the evaluation system that the CPT uses.

He explained that the states covered by the work of the CPT are the Council of Europe Members. They survey prisons, detention centres for illegal migrants, police stations, psychological hospitals and even social care institutions (for example for aged people). Originally cases of Torture or Degrading Treatment and Punishment were brought to the European Court of Human Rights (ECHR) upon complaint of individuals and a binding decision would be the result. The purpose in establishing CPT was to have a more preventive approach. It was set up by Treaty in 1987.

It acts *ex ante* and adopts a non-judicial approach. Its working method is to pay periodic and *ad hoc* visits. Periodic visits are announced, but which institutions will be scrutinised is not made known beforehand. *Ad hoc* visits are not announced. The majority of the CPT members are lawyers, but some doctors are member as well. The members are appointed by National Parliaments.

A visit normally starts with a tour organised by the local authorities. The second stage consists of the CPT spending 2-3 days making their own enquiries. The CPT has unaccompanied access to all information, places, files and persons. Persons can be interviewed in private by the commission. They can even take people to an outside place for more privacy. Confidentiality is important; no information goes to the press or the ECHR.

For the purpose of an effective investigation, a cooperative approach is necessary between the Commission and the national authorities. The investigation is normally carried out on the basis that each knows what the other knows. This cooperative approach is more effective.

The CPT has tried to develop standards for prison conditions, migrant detention centres etc. These are set out in a confidential source book which guarantees that all members of the CPT use the same standards. Public statements are made about standards on issues such as the use of immigration centres and electronic belts to control prisoners.

The outcome of the visit is a report. In the report to the Government of the state visited the CPT assess the findings and draws up a list of recommendations. Recommendations are made on the basis of what has been examined:

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www.cpt.coe.int

1. It is always made clear that ill-treatment will not be tolerated;
2. Material conditions are covered;
3. The importance of training of the staff is stressed ;
4. It is emphasised that states must follow basic principles such as access to medical staff, lawyers etc.;
5. The compliance of laws, regulations and local bylaws.

The CPT sends its report to the State after discussing it in a plenary session. The State decides whether it wants the report published, after which it can be used by the ECHR. If a state does not comply with the recommendations or tries to deceive the CPT, the confidentiality can be waived in which case the CPT can make a public statement. Sometimes the CPT holds seminars in countries to address issues. Its annual reports are published on its website www.cpt.coe.int. In 2009 the CPT tried to set standards for migrant detention centres.

The main concerns of the CPT are:

1. A tendency to use less transparent procedures (attacking terrorism);
2. A failure to investigate and punish those responsible for ill-treatment and torture;
3. Prison overcrowding (because of migrants being prosecuted / recidivism / prosecution of drugs related offences);
4. Treatment of persons detained under aliens' legislation
5. Lack of knowledge of the work done by the CPT. Some countries do agree to publish immediately, but many delay the publication a report for very many years and some do not ever allow publication.

Standards should be established In the EU the road map for the Procedural Safeguards which would obviate the need of the CPT if those were followed. Until then confidence between judges that proper standards are being applied should be built in practice. It is important to note judges play a significant role in ensuring standards that are met in each state.

2.3 Mutual Confidence: what does it entail?

A second presentation was given by Mr Peter Kortenhorst on mutual confidence and what it entails. Mr Kortenhorst is a Justice at the Court of Appeal of Amsterdam who was previously seconded to the European Commission– DG JLS.

He explained the developments from mutual assistance to mutual recognition. 10 to 15 years back the developments in this area started with mutual assistance requests. Judges and prosecutors were in direct contact and the method that used was based on close cooperation. Mutual trust was developed based on these close contacts and there was a certain knowledge of the systems of the State with which cooperation was sought. The 1999 Tampere programme introduced the instrument of Mutual Recognition and with it the condition that there be mutual trust. Unfortunately trust cannot be commended by decree. Tampere also stated that to enhance mutual confidence in judicial decisions approximation of legislation would be necessary.

After Tampere, the EAW was negotiated and agreed upon in a short period of time. As a consequence of the free movement of persons it was perceived as essential to set up a system that would allow the easy return of criminals. The aim was to create an area of Justice, Freedom and Security; the debate on what a common system for Justice entailed was never held.

The general assumption on which judges and prosecutors are to act should be that, even though another legal system may not be similar, it has the same guarantees. There is also a general assumption of trust between judges. This trust is helped if common standards such as the principle that there will be a translator and a right to a lawyer would be in place. These common standards are costly and governments are therefore reluctant to progress these. Politicians have not been willing to tackle issues such as proportionality and the excessive use

by some states of the EAW for cases for which it was never intended. Instead politicians tend to blame judges for not applying the EAW correctly. To help progress the development and establishment of common standards the judiciaries (and lawyers) could confront politicians with the problems they encounter. This would help the discussion on the future of Mutual Recognition in the EU⁴. This discussion should amongst others include terminology, prison conditions, prison regimes, in absentia convictions etc.

2.4 What is a common judicial culture?

Peter Kortenhorst continued and explained that Mutual Recognition calls for a new attitude. The Nordic Arrest Warrant (based on uniform extradition legislation) is a good example of an instrument featuring Mutual Recognition. It is very successful largely due to the fact that the Nordic Countries share a judicial culture and understand each others' language. This leads to the conclusion that if enhanced application of Mutual Recognition instruments is to be effective, judges must learn and understand more about the European judicial culture and its application in the individual Member States.

Judges should also have a different mindset. They should open up and be prepared to be more creative in using their own system and the possibilities introduced by EU instruments. The general attitude should be based on a willingness to help each other. This should be the point of departure and the basic attitude towards Mutual Recognition instruments.

This basic attitude should be combined with a willingness of the judiciary to make clear to politicians on a national level which problems they face in applying Mutual Recognition instruments. Judges should call for better cooperation and more (minimum) standards, more common legislation on basic issues and a common understanding of conditions. The implementation and existence of minimum standards should also be agreed upon. However, politicians seem reluctant to put these in place.

Based on the presentations, the working group came to the following conclusions as regards evaluation and mutual confidence:

- Minimum procedural safeguards are necessary and would help Mutual Recognition , but this will take time;
- The judiciary should draw attention to the problems so that the legislative and executive branches of the state know what has to be done;
- Training of national judges is important to promote a common judicial culture; it should also focus on acquiring knowledge of the different systems
- Particular attention should be paid to the new generation of judges; measures such as organising exchanges of young judges are an investment in the future;
- At the university level, lawyers should receive education on what lawyers need in the EU and its common area for justice;
- Chat boxes, forums etc for judges could be helpful;
- Role of ECJ – risk of overlapping jurisdiction; the ECJ is starting from the base of Strasbourg. It would be a disaster if they took a different road or did not begin at a starting point of the Strasbourg jurisprudence. National judges should phrase references in a way to set up points that are causing difficulties.
- Interpreters should also have knowledge of the different systems

⁴ For further reading see the study of Vernimmen/Surano on the Future of Mutual Recognition in the EU: http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf.

Recommendations by the working group on evaluation:

- The working group feels that the Judiciary in Europe should understand and accept its role and responsibility in developing minimum standards. A set of representative standards for the Justice Sector should be developed.
- The Judiciaries of Europe should also be prepared to take the next step for evaluating compliance with these minimum standards. These common minimum standards and their evaluation will contribute to mutual confidence. Councils for the Judiciary through the ENCJ should take the lead (when appropriate in cooperation with others).
- Subjects that could be taken forward are, amongst others, competencies/judicial appointments criteria, judicial training; processing of information; judicial ethics (deontology). The process of developing these common standards is a goal in itself. The evaluation of these standards should be on the basis of dialogue and reciprocity. Dialogue is more important than enforcing compliance, as dialogue would lead to compliance.
- If an evaluation instrument is being set up by the Member States and the European Commission, as foreseen in the Lisbon Treaty and Stockholm Programme, and issues are being evaluated that involve the judiciary the ENCJ (and an organisation of prosecutors) should be involved. Therefore the ENCJ should monitor the developments in these areas and seek cooperation with the European Commission.

3. Training/ management of knowledge

Judicial training on EU law is a topic that has been discussed on the European level for some time now⁵. The definition of training seems rather wide, as it also includes access to information, the management of knowledge and the enhancement of mutual trust. The responsibility of training for judges, including the development of curricula and training materials, should lie with the judges either through or in cooperation with Councils for the Judiciary. In most Member States training is dealt with by a separate training institute, but in general a relation between the training institute and the Council for the Judiciary does exist. The promotion of a European culture or orientation of the judiciary is a shared responsibility of training institutes, Councils for the Judiciary, judges and Ministries of Justice (who have to provide the resources).

At the moment, there seems to be no sense of urgency among many judges to be an effective part of the common European judicial area. Training is one of the methods to enhance a common European culture in the judiciary. Therefore resources and the quality of the training to this end must be guaranteed. One of the tasks of the Councils for the Judiciary - and the ENCJ - should be to stimulate national governments to invest in the training of judges and in the training institutes. The working group agreed that the importance of training should be underlined by ENCJ. The ENCJ should look into closer cooperation with the current players in this field on a European level, which are i.a. ERA, EIPA and EJTN.

3.1 The Governance of Training

There continues to be a discussion on the creation of a European body to provide or supervise judicial training. If this were to be set up, it would be important to examine the following issues:

- The way in which the judicial training institutes in Member States are to be represented where the responsibility is shared with or is that of the Ministry of Justice.
- The way in which those responsible for resources within the Member States are represented; training programmes have to be constructed within the available judge release time and the financial resources available and these are in many cases the responsibility of Councils or similar organisations.
- The way in which the European Commission should be represented.
- The question of setting standards for training on the national level (financial commitment, quality, time available for judges)
- The relationship to ERA, EIPA etc.
- Making training compulsory – is this a Member State or EU competence?
- Accountability

3.2 On judicial exchanges

Judicial exchanges have proven to be a valuable way of developing a common European judicial area and a common judicial culture. However, a stage has been reached where it would be valuable to review the exchange programme in the light of the experience to date and the proposals in the Stockholm Programme for its expansion.

- What is the aim of the exchange programme?
 - To develop the understanding of each judge?
 - To develop the understanding of judges who can then teach others? Is this realistic? Will reports simply be forgotten?
 - To develop the understanding of those involved in specialist areas, such as the EAW or Brussels II.

⁵ Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union
<http://register.consilium.europa.eu/pdf/en/08/st14/st14757.en08.pdf>

- How can the exchange programme be made cost effective?
- If the aim is to develop the understanding of each judge, how can the large numbers be covered?
- If the aim is to assist in teaching others, how is this to be done? Should those selected be selected on the basis of their ability to teach others?
- How should the exchange programme be structured?
- How are the number of places for each Member State to be allocated?
- How is the demand for exchanges to the countries with commonly spoken languages to be managed?
- How is the allocation within a Member State to be managed – surely a question for the Member State?

Recommendations by the working group on training, strengthening Mutual Confidence and the development of a European Judicial Culture

A distinction should be made between activities directed at improving the knowledge of EU law and measures intended to strengthen mutual confidence:

- Training in EU law is a Member State obligation. It is important that this training is directed not only at learning EU law, but also at understanding other systems. It is important to underline that these matters have to have a fixed place in initial and continuous training.
- The EJTN provides excellent opportunities for judges to meet judges from other Member States, either through training seminars for judges from various EU Member states or by participation in the exchange programmes. Networking at these events is important. It has, however to be appreciated that exchanges have a limited role, as in practice no programme can reconcile the number of judges who would need to go on exchanges to the need for judges to deal with their cases.
- The focus should be on the new generation of judges; organising exchanges for them specifically is an investment in the future.
- Exchanges can also be achieved by promoting the establishment of *jumelages* between courts (twinning of courts) of EU Member States.
- Encouraging judges who specialize in certain areas of the law to participate in judicial networks (i.e. European Association of Labor Court Judges, European Commercial Judges Forum). The organization of bilateral study visits also enhances mutual understanding and mutual confidence.

4. Developing a network of contacts

There are numerous networks active in the EU⁶. Some of them are established by professional organizations, some have been set up by judicial institutions and others have been set up by EU institutions. The European Judicial Network and the European Judicial Network in Civil and Commercial matters have both been set up by a EU Council (JHA Council) decision.

The European Judicial Network (EJN) is a network of national contact points for the facilitation of judicial co-operation in criminal matters. The network was created by the Joint Action 98/428 JHA of 29 June 1998 in order to fulfill Recommendation n°21 of the Action Plan to Combat Organised Crime. On the national level it is run by the Ministries of Justice. The EJN was the first practical structured mechanism of judicial co-operation to become truly operational. The EJN secretariat forms part of the Eurojust staff, but functions as a separate unit. The website (www.ejn-crimjust.europa.eu) of the

⁶ For an overview please check the directory of European Bodies relating to Justice of Lord Justice Thomas, available on www.ency.eu under publications

network contains information on mutual legal assistance, the European Arrest Warrant and information on national legal systems.

The European Network in Civil and Commercial matters was established in 2001. The network consists of representatives of the Member States' judicial and administrative authorities and meets several times each year to exchange information and experience and boost cooperation between the Member States as regards civil and commercial law. The main objective is to make life easier for people facing litigation of whatever kind where there is a transnational element - i.e. where more than one Member State is involved. The European Union currently has a wide variety of national legal systems. This diversity often creates problems when litigation transcends national borders. Individuals and firms, and even more so the legal professions, will find it very useful to have access to knowledge about the various national systems of civil and commercial law and the legislative instruments of the European Union and other international organizations. The network has its own website (www.ejn-civiljustice.europa.eu) which purpose is to outline various national systems of civil and commercial law.

Both EJNs have as an aim the development of networks of contacts between judicial authorities. At the moment the contacts between judges within the framework of the EJN's do not seem to be very well developed. The working group would like to reinforce and enhance these contacts and get the EJNs better known among judges.

In the area of Criminal Justice networks of judges hardly exist. Especially in the area where EU instruments are based on mutual recognition a network of judges would allow direct contact between judges. The working group feels that the ENCJ should look at the development of a series of contacts in criminal justice using as a basis the **European Arrest Warrant**. At a conference organised in London by the Aire Centre on 12/13 February 2010, judges from several Member States with a particular interest in or responsibility for the EAW asked the EJM (criminal) and the ENCJ to look into the establishment of a network of such judges which would facilitate the operation of the EAW. This request is being examined by the ENCJ.

The working group also explored the Dutch concept of the "**Court Co-ordinator**". The Court Coordinator European Law (CCE) is responsible within his court for the adequate co-ordination of access to European law with a view to its practical application. He contributes to the correct application of European law. The CCE serves as an information intermediary. He knows where and how he can quickly generate knowledge about European law. Within his court, he serves as the contact for matters concerning European law and, where necessary, uses the CCE network for this purpose. He shares knowledge and information about European law with colleagues in the court and the CCE network, for example by gathering and providing such information

Meanwhile, it is clear from the questionnaire that most judiciaries (sometimes through the Council for the Judiciary) have set up some sort of **internal network of judges expert in aspects of EU law** (such as the EAW or Brussels II). If such networks existed on the national level, they could be linked throughout Europe and even be connected to networks such as the European Judicial Network (criminal) of the European Judicial Network in Civil and Commercial Matters.

Recommendations of the working group on Court coordinators European Law & Networks of experts on EU law aspects:

- On the national level the dissemination of EU knowledge could be done, either by putting in place a network of EU law specialists or by appointing judges who provide access to information on EU Law (information intermediary) with a view to its practical application. The aim should be to ensure that the available information is easy accessible for all judges. The challenge is to organize these specialists or court coordinators so that they are easily found and are approachable by their colleagues
- The ENCJ should promote the connection of national networks of Court coordinators or experts in EU law throughout Europe
- On a European level, it is necessary to promote the development of judicial networks that focus on improving mutual understanding on specialist issues and problems and on helping the judiciaries in Member States identify and address these common concerns by sharing experiences and improving communication channels.
- It is important that these networks are developed in a coordinated way. The ENCJ could and should promote the setting up of these networks and support the management of these networks by ensuring that they are properly structured and facilitating contacts between Members.
- In addition to these network, it is important that in individual cross-border matters, there is sufficient explanation of and information relating to the other jurisdictions involved in the matter to enable the national judge to understand the particular context of the cross boarder matter before them

5. Conclusions

Based on the presentations by experts during the working group meetings, the replies to the questionnaire and the discussions in the working group, the working group drafted the recommendations stated above. Put together these recommendations are:

On Evaluation:

1. The Judiciary in Europe should understand and accept its role and responsibility in developing minimum standards for the Justice Sector. A set of representative standards should be developed by the ENCJ.
2. The Judiciaries of Europe should also be prepared to take the next step for evaluating compliance with these minimum standards. These common minimum standards and their evaluation will contribute to mutual confidence. Councils for the Judiciary through the ENCJ should take the lead in this (when appropriate in cooperation with others).
3. Subjects that could be taken forward are amongst others competences/judicial appointments criteria, judicial training; process of information; judicial ethics (deontology). The process of developing these common standards is a goal in itself as well. The evaluation of these standards should be on the basis of dialogue and reciprocity. Dialogue is more important than enforcing compliance, as dialogue would lead to compliance.
4. If an evaluation instrument is being set up by the Member States and the European Commission, as foreseen in the Lisbon Treaty and Stockholm Programme, and issues are being evaluated that involve the judiciary the ENCJ (and an organisation of prosecutors) should be involved. Therefore the ENCJ should monitor the developments in these areas and seek cooperation with the European Commission.

On training, mutual confidence and the development of a European Judicial Culture:

5. Training in EU law is a Member State obligation. Training includes not only learning EU law, but also in understanding other systems. These matters have to have a fixed place in initial and continuous training.
6. The EJTN provides excellent opportunities for judges to meet judges from other Member States, either through training seminars for judges from various EU Member states or by participation in the exchange programmes. Networking at these events is important. However these exchanges have a limited role, as no programme can, in practice reconcile the number of judges who would need to go on exchanges with the need for judges to deal with their cases.
7. Exchanges can also be achieved by promoting the establishment of *jumelages* between courts (twinning of courts) of EU Member States.
8. Encouraging judges who specialize in certain areas of the law to participate in judicial networks (i.e. European Association of Labor Court Judges, European Commercial Judges Forum).
9. The organization of bilateral study-visits also enhances mutual understanding and mutual confidence.
10. Councils for the Judiciary should actively promote the activities mentioned above using the ENCJ as a facilitator.

On Court coordinators European Law & Network of experts on EU law aspects:

11. On the national level the dissemination of EU knowledge could be either done by putting in place a network of EU law specialists or by appointing judges who provide access to information on EU Law (information intermediary) with a view to its practical application. The aim is that the available information is easily accessible for all judges. The challenge is to organize these specialists or court coordinators so that they are easily found and approachable by their colleagues.
12. The ENCJ should promote the connection of national networks of Court coordinators or experts in EU law throughout Europe
13. On the European level, it is necessary to promote the development of judicial networks that focus on improving mutual understanding of specialist issues and problems and on how the Member States' judiciaries identify and address these common concerns through sharing experience and through improved communication channels.
14. It is important that these networks are developed in a coordinated way. The ENCJ could and should promote the setting up of these networks and support the management of these networks by ensuring they are properly structured and facilitate contacts between Members.
15. In addition to these networks, it is important that in individual cross-border matters, there is sufficient explanation of and information relating to the other jurisdictions involved in the matter to enable national judiciaries to understand the particular context of the cross border matter before them. Information that is available should be easily accessible (through web-sites like the EU Justice portal)

6. Proposals for future action by the ENCJ:

The working group would like to see the ENCJ take up the following activities which could be included in the Strategic Plan:

1. The ENCJ should develop a set of representative minimum standards for the Justice Sector.
2. The ENCJ should study the feasibility of evaluating the compliance with these minimum standards. These standards should be evaluated on the basis of dialogue and reciprocity.
3. The ENCJ should monitor developments in the EU and seek cooperation with the European Commission in the additional evaluation mechanisms that may be set up by the Member States and the European Commission.
4. The ENCJ could promote the setting up of networks of judges (especially in the areas in which Mutual Recognition instruments are put in place like the European arrest Warrant), ensure that they are properly coordinated and support the management of these networks by facilitating contacts between the Members.

<h2>List of participants</h2>

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12. Martin Petrasch

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