

BOSMIP II

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Introduction to taxation framework

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1. Countries of the EU and size of the market

How many countries are part of the EU?

27 Member Countries

How many citizens are currently living in the EU?

Almost 500 million (2007)

What is the EU GDP?

More than 16,500 billion US\$ (2007)

2. The Growth of the EU: there are currently 27 MS

1957

1. FRA
2. ITA
3. NL
4. BL
5. LUX
6. GER

1973 (1st)

7. DEN
8. IRL
9. UK

1981 (2nd)

10. GRE

1986 (3rd)

11. POR
12. SPA

1995 (4th)

13. AUT
14. FIN
15. SWE

2004 (5th)

16. CYPRUS
17. CZ REP
18. ESTONIA
19. HUN
20. LATVIA
21. LITHUANIA
22. MAL
23. POL
24. SLOVAKIA
25. SLOVENIA

2007 (5th – part II)

26. BUL
27. ROM

3. How many currencies are there in the EU?

13 currencies

- Euro (€) (EUR)
- British pound
- Bulgarian lev
- Czech koruna
- Danish krone
- Estonian kroon
- Hungarian forint
- Latvian lats
- Lithuanian litas
- Polish złoty
- Romanian leu
- Slovak koruna
- Swedish krona

4. EU institutions

1. **European Parliament:** democratic voice of the peoples of Europe. Right to be heard. Responsible for budget. Has voting and veto power on specific policy items
2. **European Commission:** Driving force and executive body. It initiates secondary law (e.g. directives). Responsible for observing Member States in respect to compliance with EC law (infringement procedures). In the area of competition law it has its own decision making power
3. **Court of Justice:** Interprets EC law
4. **Council of the European Union:** Legislative and decision-making body. It ensures EC Treaty objectives are met

5. EC Law

What is “primary” law?

“Primary” law refers to the law enshrined in all of the treaties
(e.g. Basic Freedoms)

What is “secondary” law?

“Secondary” law refers to regulations, directives and
decisions (e.g. Merger Directive)

6. Basic freedoms (1)

There is a non-discrimination article in the EC Treaty which prohibits both direct and indirect discrimination on the grounds of nationality. This principle is manifested in the basic freedoms which are guaranteed by the Treaty:

- General freedom of movement and private residence (Art. 18 of the EC Treaty)
- Free movement of goods (Art. 28-30)
- Free movement for workers (Art. 39-42)
- Freedom of establishment (Art. 43-48)
- Freedom to provide services (Art. 49-55)
- Free movement of capital (Art. 56-60)

6. Basic freedoms (2) – an example

Art. 43 EC

FREEDOM OF ESTABLISHMENT

- = right for Community Nationals to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals

Art. 48 EC

COMPANIES

- = formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall be treated in the same way as national persons who are nationals of Member State

7. EU policy taxation policy (1)

┆ 2001 Lisbon strategy as starting point

- *there is no need for an across the board harmonisation of Member States' tax systems. Provided that they respect Community rules, Member States are free to choose the tax systems that they consider most appropriate and according to their preferences.*

Communication of 23 May 2001 on

"Tax policy in the European Union - Priorities for the years ahead"

7. EU policy taxation policy (2)

/ Targeted measures

- Directives
- Guidance on ECJ rulings
- Transfer pricing
- EU Model Convention or Multilateral Convention (and Commentary)

/ Comprehensive measures

- Some form of common (consolidated) tax base

7. EU policy taxation policy (3)

/ The Community acquis and Croatia

- VAT
- Excise duties on mineral oils, tobacco and alcohol
- Direct tax
- Administrative co-operation and mutual assistance

8. Tax directives (1)

- ! **Mutual Assistance Directive:** facilitates information exchange between tax authorities of Member States, to prevent tax evasion and tax avoidance
- ! **Mergers Directive:** introduces a common system of taxation for cross-border restructuring operations. It does this by deferring capital gains taxation arising on a merger of companies within Member States
- ! **Parent – Subsidiary Directive:** aimed at removing the double taxation of profits distributed by group companies resident in one Member State to a parent company registered in another Member State

8. Tax directives (2)

- ! **Interest and Royalties Directive:** aims to eliminate withholding taxes on interest and royalty payments between companies within an EU group
- ! **Savings Directive:** provides that each Member State is expected to exchange information to other Member States on interest paid from that Member State to individual savers resident in other Member States

9. EC LAW DEVELOPMENTS

- **Positive integration**
 - Amendments to the EC Treaty
 - Regulations, Directives, Decisions
 - Soft law (e.g. Communications)
- **Negative integration**
 - European Court of Justice (e.g. infringement procedures, preliminary rulings, etc.)

10. ECJ rulings on direct tax and (main) principles (1)

- ! DIRECT TAXATION FALLS WITHIN THE COMPETENCE OF THE MEMBER STATES

BUT

- ! THE MEMBER STATES MUST EXERCISE THAT COMPETENCE CONSISTENTLY WITH COMMUNITY LAW

10. ECJ rulings on direct tax and (main) principles (2)

« *Direct taxation falls within the competence of the Member States* »

- ! Nothing specific in the Treaties about direct taxation
- ! Only way to act :
 - art. 94 EC
 - small results : 5 directives :
 - * 77/799 EEC
 - * 90/434 and 435 EEC
 - * 2003/48 and 49 EC
- ! Many proposals of the Commission...
- ! No case law until 1985 and only 5 cases until 1994

10. ECJ rulings on direct tax and (main) principles (3)

« *But the Member States must exercise that competence consistently with EC-Law* »

10. ECJ rulings on direct tax and (main) principles (4)

With consistency, the ECJ case-law has defined :
the **obligation to exercise the fiscal competence**
consistently with EC-Law
as the prohibition

in the fields of
free movement of - persons
- services
- capital
freedom of - establishment

of **ANY DISCRIMINATION OR RESTRICTION**
(BARRIER) except if they are justified.

10. ECJ rulings on direct tax and (main) principles (5)

Cases decided :	1957-1985	0
	1986-1994	5
	1995-2005	more than 45
	2006-2007	more than 60
	TOTAL	over 110

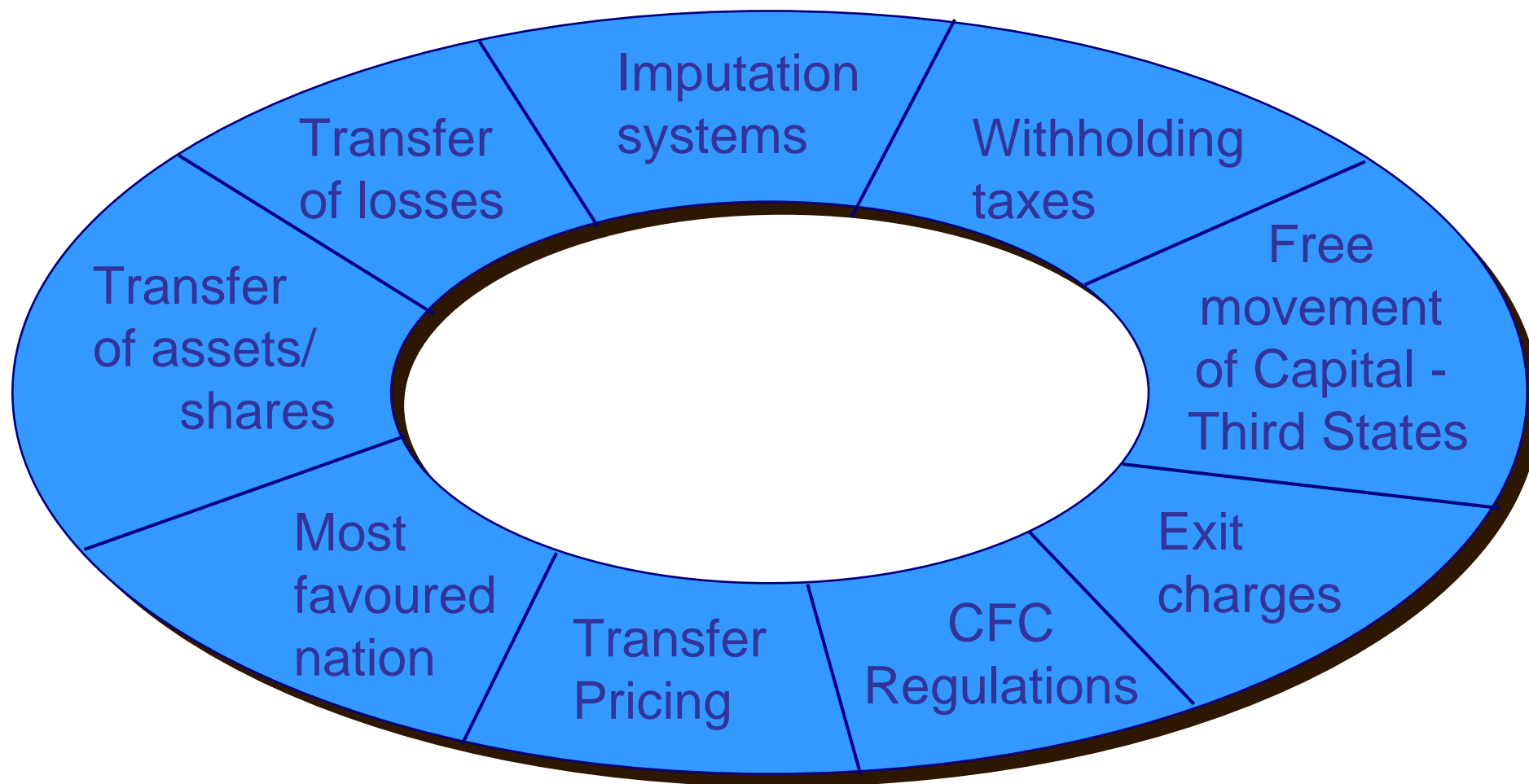
(more than 80% of which declare the national tax system inconsistent with EC-law)

and only about 10% from infringement procedures

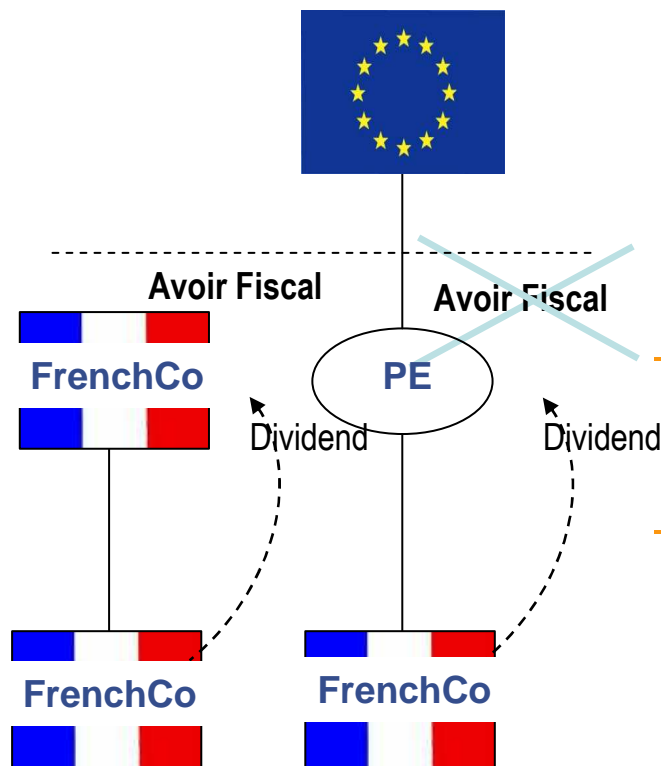
Pending cases more than **45**

10. ECJ rulings on direct tax and (main) principles (6)

Areas decided or to be decided by the ECJ



28.1.86 – 270/83 Comm v France – Avoir fiscal



– Facts

- In order to reduce economic double taxation, the French tax law provides for a tax credit equal to half of the tax paid by the distributing company (3)
- Such a credit is not attributed to PE of EU companies (4)

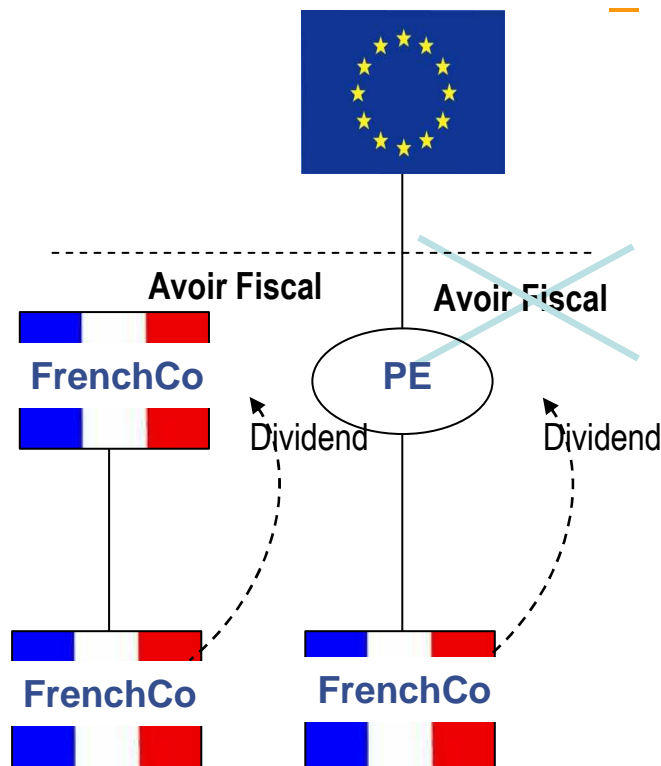
– Question

- Is the different in treatment compatible with EU law?

– Have you exercised a fundamental Freedom?

- Freedom of establishment includes the right to pursue activities through a branch or an agency. It is the registered office, central administration or principal place of business that serves as the **connecting factor** (18)

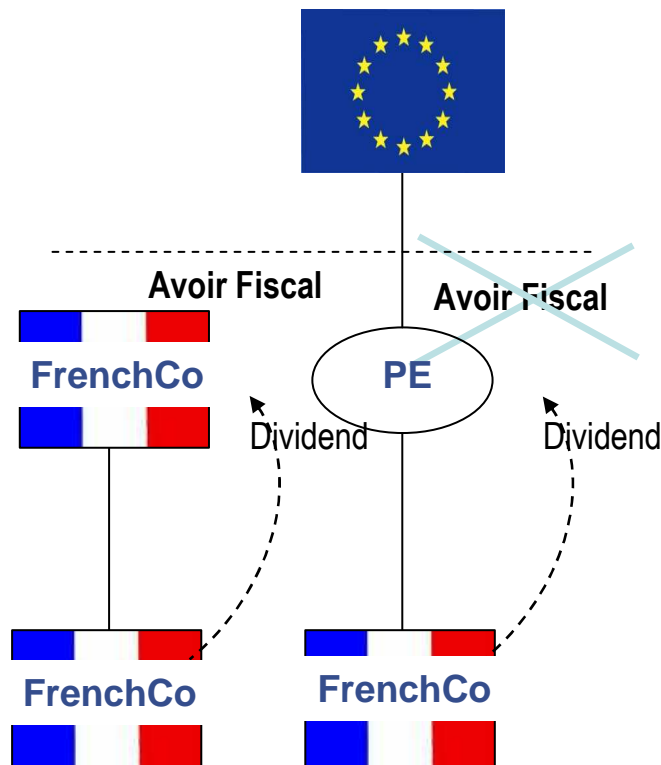
28.1.86 – 270/83 Comm v France – Avoir fiscal (2)



– Is there a discrimination or a restriction? Overt? Covert? Home or Host State?

- Acceptance of the proposition that the Member State in which the company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated abroad would deprive that provision of all meaning (18)
- For the purposes of calculating corporate income tax liability, French tax law does not draw any distinction (19). Since they are on the same footing for the purposes of taxing their profits, the non-recognition of the avoir fiscal is a discrimination (20). Such a discrimination constitutes a restriction incompatible with EU Law (27)

28.1.86 – 270/83 Comm v France – Avoir fiscal (3)



– Is there a justification?

- Advantages that PE may enjoy vis-à-vis French companies. This is never a justification (21)
- Lack of tax harmonization. Such a justification cannot be accepted in **this** case (24)
- Risk of tax avoidance. This is not a justification (25)
- The difference in treatment is due to the DTT. DTT does not concern the instant case

– Proportionality? N/A

11. Grouping the main ECJ rulings on direct tax (1)

- ! Primary right of establishment COM (2006) 825 final of December 19, 2006
 - 27.9.88 – 81/87 Daily Mail
 - 4.3.04 – C-334/02 de Lasteyrie du Saillant
 - 7.9.06 – C-470/04 N

11. Grouping the main ECJ rulings on direct tax (2)

Secondary right of establishment

- Economic double taxation
 - 28.1.86 – 270/83 Comm. v. France – Avoir fiscal
- Juridical double taxation
 - 13.7.93 – C-330/91 Commerzbank
- Carry over relief
 - 12.4.94 – C-1/93 Halliburton
- Cash flow disadvantages
 - 21.9.99 – C-307/97 Saint-Gobain
- Tax rates and taxable base
 - 29.4.99 – C-311/97 Royal Bank of Scotland
 - 23.2.99 – C-311/97 CLT-UFA
 - 22.3.07 – C-383/05 Talotta

11. Grouping the main ECJ rulings on direct tax (3)

! Dividends COM (2003) 810 final of December 19, 2003

- Inbound dividends
 - 6.2.00 – C-35/98 Verkooijen
 - 8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst
 - 15.7.04 – C-315/02 Lenz
 - 7.9.04 – C-319/04 Manninen
 - 14.11.06 – C-513/04 Kerckhaert-Morres
 - 12.12.06 – C-374/04 ACT Group Litigation
 - 12.12.06 – C-446/04 FII (Franked Investment Income) Group Litigation
- Outbound dividends
 - 27.11.04 – E-1/04 Fokus (EFTA)
 - 12.12.06 – C-374/04 ACT Group Litigation
 - 14.12.06 – C-170/05 Denkavit II
 - 8.11.07 – C-379/05 Amurta

11. Grouping the main ECJ rulings on direct tax (4)

! Parent subsidiary directive

- 17.10.96 – C-283/94 Denkavit
- 6.6.00 – C-375/98 Epson
- 4.10.01 – C-294/99 Athinaiki Zythopoiia
- 25.9.03 – C-58/01 Océ

! Thin capitalization and interest deduction

- 12.12.02 – C-324/00 Lankhorst – Hohorst
- 18.9.03 – C-168/01 Bosal
- 23.2.06 – C-471/04 Keller
- 13.3.07 – C-524/04 Thin cap
- 29.3.07 – C-347/04 Rewe Zentralfinanz (as successor of ITS Reisen)
- 17.1.08 – C-105/07 NV Lammers & van Cleeff

11. Grouping the main ECJ rulings on direct tax (5)

! Merger directive

- 17.7.97 – C-28/95 Leur-Bloem
- 15.1.02 – C-43/00 Andersen & Jensen ApS
- 13.12.05 – C-411/03 SEVIC (company law)
- 5.7.07 – C-325/05 Kofoed

11. Grouping the main ECJ rulings on direct tax (6)

! Group relief

- 16.7.98 – C-264/96 ICI
- 18.11.99 – C-200/98 X AB et Y AB
- 18.7.07 – C-231/05 AA v. FIN

! Losses COM (2006) 824 final of December 19, 2006

- 15.5.97 – C-250/95 Futura
- 14.12.00 – C-141/99 AMID
- 12.12.02 – C-431/01 Mertens
- 12.6.03 – C-234/01 Gerritse
- 13.12.05 – C-446/03 Marks & Spencer
- 3.10.06 – C-290/04 Scorpio
- 15.2.07 – C-345/04 Centro equestre

11. Grouping the main ECJ rulings on direct tax (7)

! Insurance premiums

- 28.1.92 – C-204/90 Bachmann
- 28.4.98 – C-118/96 Jessica Safir
- 26.2.03 – C-422/01 Skandia
- 20.1.07 – C-150/04 Comm. v. Denmark
- 5.7.07 – C-522/04 Comm. v. Belgium

! Leasing payments

- 26.10.99 – C-297/97 Eurowings

! Repayment of excess taxes

- 8.5.90 – 175/88 Biehl I
- 13.7.93 – C-330/91 Commerzbank

11. Grouping the main ECJ rulings on direct tax (8)

! Splitting tariff and others deductions

- 26.1.93 – C-112/91 Werner
- 14.2.95 – C-279/93 Schumacker
- 11.8.95 – C-80/94 Wielockx
- 14.11.95 – C-484/93 Svensson & Gustavsson
- 12.5.98 – C-336/96 Gilly
- 14.9.99 – C-391/97 Gschwind
- 12.6.03 – C-234/01 Gerritse
- 1.7.04 – C-169/03 Wallentin
- 5.7.05 – C-376/03 D
- 9.11.06 – C-520/04 Turpinen

11. Grouping the main ECJ rulings on direct tax (9)

! Tax treaties

- 28.1.86 – 270/83 Comm v France – Avoir fiscal
- 11.8.95 – C-80/94 Wielockx
- 12.5.98 – C-336/96 Gilly
- 21.9.99 – C-307/97 Saint-Gobain
- 12.12.02 – C-385/00 de Groot
- 5.7.05 – C-376/03 D
- 14.11.06 – C-513/04 Kerckhaert-Morres
- 12.12.06 – C-374/04 ACT Group Litigation
- 6.12.07 – C-298/05 Columbus

11. Grouping the main ECJ rulings on direct tax (10)

! Anti avoidance COM (2007) 785 final of December 10, 2007

- 17.7.97 – C-28/95 Leur-Bloem
- 16.7.98 – C-264/96 ICI
- 9.3.99 – C-212/97 Centros (company law)
- 26.10.99 – C-297/97 Eurowings
- 8.3.01 – C-397/98 – C/410/98 Metallgesellschaft / Hoechst
- 12.12.02 – C-324/00 Lankhorst – Hohorst
- 4.3.04 – C-334/02 de Lasteyrie du Saillant
- 13.12.05 – C-446/03 Marks & Spencer
- 12.9.06 – C-196/04 Cadbury Schweppes
- 5.7.07 – C-325/05 Kofoed
- 17.1.08 – C-105/07 NV Lammers & van Cleeff v. Belgium

! Third countries

- 18.12.07 – C-101/05 S v. A

Thank you!



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