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(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – AUSTRIA

SA.32554 (2009/C) Pomoc restrukturyzacyjna na rzecz Hypo Group Alpe Adria

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE

(Tekst mający znaczenie dla EOG)

(2013/C 59/02)

Pismem z dnia 5 grudnia 2012 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła władze Austrii o swojej decyzji o czasowym zatwierdzeniu dwóch środków służących dokapitalizowaniu przedsiębiorstwa Hypo Group Alpe Adria na łączną kwotę 1,5 mld EUR i rozszerzeniu postępowania określonego w art. 108 ust. 2 TFUE dotyczącego wyżej wspomnianej pomocy na restrukturyzację.

Zainteresowane strony mogą zgłaszać uwagi na temat środka pomocy, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

European Commission
Directorate-General for Competition
State Aid Registry
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Uwagi te zostaną przekazane władzom austriackim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

PODSUMOWANIE

Przedsiębiorstwo Hypo Group Alpe Adria (HGAA) jest grupą finansową prowadzącą działalność w Austrii, we Włoszech, w Słowenii, Chorwacji, Bośni i Hercegowinie, Serbii i Czarnogórze.

Zgodnie z decyzją austriackiego organu nadzorczego HGAA musi osiągnąć wyższe wskaźniki kapitałowe do dnia 31 grudnia 2012 r. W tym celu HGAA wymaga dodatkowego kapitału w wysokości 1,5 mld EUR. Planowane wsparcie przez Austrię obejmuje dwa środki: Austria przystąpi do podwyższenia kapitału w wysokości 500 mln EUR w postaci udziałów i udzieli gwarancji państwa dla podporządkowanych instrumentów kapitałowych Tier II o wartości nominalnej 1 mld EUR.

Komisja przeprowadziła ocenę środków pomocy na podstawie art. 107 ust. 3 lit. b) Traktatu o funkcjonowaniu Unii Europejskiej, który zezwala na pomoc „mającą na celu zaradzenie poważnym zaburzeniom w gospodarce państwa członkowskiego”.

Celem pomocy jest wyeliminowanie zagrożenia dla stabilności gospodarki Austrii, jakie mogłyby za sobą pociągnąć upadek HGAA. Komisja uznaje, że aby HGAA mogła spełnić wymogi kapitałowe określone przez organ nadzoru pomoc jest konieczna, lecz nie powinna ona przekraczać docelowych wskaźników kapitałowych, a gwarancji państwa należy udzielić za odpowiednią opłatą gwarancyjną.

Austria zobowiązała się do udzielenia zabezpieczenia związanego z polityką w zakresie ryzyka i nowymi transakcjami pożyczkowymi przedsiębiorstwa HGAA, jak również do przestrzegania zakazu przejmowania innych podmiotów oraz zakazu realizacji płatności kuponowych w celu uniknięcia nieuzasadnionych zakłóceń konkurencji.

Komisja uznała środki za tymczasowo zgodne z rynkiem wewnętrznym, rozszerzyła jednak formalne postępowanie wyjaśniające w sprawie restrukturyzacji HGAA. W związku z tym ostateczna zgodność środków będzie oceniona na

podstawie planu restrukturyzacji lub likwidacji, który zostanie przedłożony. Komisja zauważa, że konieczność udzielenia dodatkowej pomocy pokazuje, iż uprzednio przedłożony plan

restrukturyzacji nie był wystarczający do przywrócenia rentowności HGAA i wskazuje, że konieczne są szerszej zakresowe środki restrukturyzacyjne.

TEKST PISMA

„The Commission wishes to inform Austria that, having examined the information supplied by the Austrian authorities on an aid measure in the form of a capital injection in the form of ordinary shares and a guarantee on subordinated debt issued by Hypo Group Alpe Adria ("HGAA" or "the bank"), it has found that the aid measure is temporarily compatible with the internal market until the Commission has concluded its examination of the restructuring plan of the bank and that it has decided to extend the proceedings laid down in Article 108(2) of the Treaty on the Functioning of the European Union⁽¹⁾ ("the Treaty") which were instigated by decision C (2009)3811 final on 12 May 2009 and extended on 23 December 2009, 22 June 2010 and 19 July 2011.

1. PROCEDURE

- (1) For a detailed description of the procedure and the aid measures granted so far, reference is made to Commission Decision of 12 May 2009 in case N 254/2009⁽²⁾ ("the opening decision"), Commission Decision of 23 December 2009 in cases C 16/2009 and N 698/2009⁽³⁾ ("the December 2009 rescue decision"), Commission Decision of 22 June 2010 in case C16/2009⁽⁴⁾ and Commission Decision of 19 July 2011 in case SA.32172 (2011/NN) and SA.32554 (2009/C)⁽⁵⁾ ("the July 2011 rescue decision").
- (2) On 3 December 2012, Austria notified an additional aid measure in favour of HGAA in the form of a capital injection via ordinary shares by the Republic of Austria and a State guarantee on subordinated debt instruments which will be issued by HGAA. The notification contained a catalogue of commitments for HGAA.
- (3) Given the urgency of the measures, Austria has exceptionally agreed that the present decision is adopted in the English language.

2. DESCRIPTION

2.1. The beneficiary and the temporarily authorised aid measures

- (4) At the end of 2011, HGAA had a balance sheet total of around EUR 36 billion and risk weighted assets ("RWAs") of around EUR 24 billion, compared to a balance sheet total of EUR 43 billion with RWAs of EUR 33 billion at the end of 2008. The bank is currently active in Austria, Italy, Slovenia, Croatia, Bosnia & Herzegovina, Serbia and Montenegro. It has a significant market share in some of those countries. The bank has already started a wind-down process for some of its business lines, in particular its leasing business in Austria, Croatia, Germany, Montenegro, Hungary, Bulgaria, the former Yugoslav Republic of Macedonia and Ukraine.

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

⁽²⁾ OJ C 134, 13.6.2009, p. 31.

⁽³⁾ OJ C 85, 31.3.2010, p. 21.

⁽⁴⁾ OJ C 266, 1.10.2010, p. 5.

⁽⁵⁾ OJ C 31, 4.2.2012, p. 13.

(5) HGAA had pursued an aggressive growth strategy, in particular aiming at taking advantage of the rapidly growing markets in South-Eastern Europe. HGAA has significant problems with non-performing loans (NPLs) on its outstanding portfolio. By the end of 2011, the NPL ratio amounted to around 27%. The underlying collateral is in many cases difficult to sell in the current market environment. In addition, part of its outstanding retail loans in South-Eastern Europe is Euro- or Swiss Franc-denominated, exposing the bank to repayment risk in case of further depreciation of the local currencies.

(6) In December 2008, HGAA received EUR 700 million from its then majority shareholder BayernLB (which itself had received State support) and EUR 900 million in a Tier-1 instrument without voting rights from the Republic of Austria on the basis of the Austrian bank support scheme. In addition, HGAA received guarantees of EUR 1.35 billion for bond issues under a debt issuance programme on the basis of that scheme.

(7) Following the ultimatum of the Austrian financial market supervisory authority (*Finanzmarktaufsicht*, hereinafter "FMA") requiring the necessary measures for a recapitalisation of HGAA to be taken before the end of 2009, Austria acquired in an emergency rescue operation all shares from HGAA's owners for the symbolic price of one euro in December 2009. In addition, the bank received, besides contributions from its former shareholders, State capital amounting to EUR 550 million and an asset guarantee of EUR 100 million.

(8) Moreover, following an additional need for write-downs, Austria granted HGAA an asset guarantee amounting to EUR 200 million from 31 December 2010 until 30 June 2013.

(9) For a detailed description of the bank and the authorised aid measures so far, reference is made to recitals 17 to 19 of the opening decision, recitals 13 to 15 and 27 to 40 of the December 2009 rescue decision and recitals 15 to 19 of the July 2011 rescue decision.

2.2. The additional aid measure

- (10) Following a decision by the FMA, HGAA has to comply with a capital ratio of 12.04% by 31 December 2012. That target requires HGAA to have additional capital of EUR 1.5 billion.
- (11) In order to comply with the capital requirement imposed, the intended support by Austria comprises two measures:

1. Austria will proceed with a capital increase of EUR 500 million in the form of shares which will be newly issued at the pro rata amount of their participation in the total issued share capital (without a share premium);

2. A State guarantee on subordinated Tier-2 capital instruments with a nominal value of EUR 1 billion and a ten-year maturity.
- (12) The final coupon for the subordinated debt will be determined in a book-building operation in the actual issuance of the bond. The fee for the guarantee is calculated based on the level remuneration for core capital instruments for a distressed bank (10%), from which the coupon for the investors, who provide the liquidity, is deducted. From the resulting amount a discount of 2.3% is deducted, to take account of the lower risk linked to Tier-2 instruments as opposed to core-Tier-1 instruments. Based on a hypothetically expected coupon of [...] (*) the guarantee fee to be paid to Austria would amount to [...]. The total remuneration to be paid by HGAA (to Austria and the investors into the subordinated debt instrument) would amount to 7.7%.

3. POSITION OF AUSTRIA

- (13) Austria claims that given the systemic nature of HGAA it is indispensable that HGGA complies with the capital requirements as set out by the supervisory authority. Austria provided a letter of *Österreichische Nationalbank*, the Austrian Central Bank, in confirmation.
- (14) Austria undertakes to ensure that the commitments laid down in the Annex are complied with in full.

4. ASSESSMENT

4.1. Existence of aid

- (15) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (16) Both the capital injection and the guarantee are granted from State resources within the meaning of Article 107(1) of the Treaty. They are granted to a single undertaking and are therefore selective. They are granted under conditions which would not be available to HGAA on the markets, which is not disputed by Austria. Given that HGAA is an undertaking active in the financial sector, which is open to intense international competition, any advantage from State resources to HGAA has the potential to affect intra-Union trade and to distort competition.

4.2. Compatibility of the aid

4.2.1. Application of Article 107(3)(b) TFEU

- (17) Article 107(3)(b) of the Treaty sets out that State aid may be considered to be compatible with the internal market where it is granted "to remedy a serious disturbance in the economy of a Member State".

- (18) Despite a slow economic recovery that has taken hold since the beginning of 2010, the Commission still considers that the requirements for State aid to be approved pursuant to Article 107(3)(b) of the Treaty are fulfilled in view of the continuation of stress in financial markets. In December 2011 the Commission confirmed that view in its *Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis* ⁽¹⁾ which prolongs the application of the State aid rules adapted to the financial crisis.
- (19) The Austrian Central Bank has already at an earlier occasion confirmed that HGAA is a bank with systemic importance for the financial market in Austria and has reiterated that view by letter dated 3 December 2012. Without the measure and given the subsequent breach of capital requirements prescribed by the supervisory authority, HGAA would risk closure by the supervisory authorities.
- (20) The closure under such conditions of a bank which is considered by a Member State to be of systemic importance, such as HGAA, could directly affect the financial markets and thus the entire economy of a Member State. In the light of the current fragile situation of the financial markets, the Commission therefore continues to base its assessment of State aid measures in the banking sector on Article 107(3)(b) of the Treaty.

4.2.2. Compatibility of the measure

- (21) The *Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis* ⁽²⁾ (Banking Communication) sets out that, in line with the general principles underlying the State aid rules, which require that the aid granted does not exceed what is strictly necessary to achieve its legitimate purpose and that distortions of competition are avoided or minimized as far as possible, all support measures have to be:

- well-targeted in order to be able to achieve effectively the objective of remedying a serious disturbance in the economy;
- proportionate to the challenge faced, not going beyond what is required to attain that effect, and
- designed in such a way as to minimize negative spill-over effects on competitors, other sectors and other Member States.

The aid is well-targeted

- (22) The purpose of the aid is to eliminate the threat to the stability of the Austrian economy that the failure of HGAA could entail.

⁽¹⁾ OJ C 356, 6.12.2011, p. 7.

⁽²⁾ *Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, OJ C 270, 25.10.2008, p. 8, point 15.

(*) Confidential information.

(23) According to the Austrian authorities, the FMA has confirmed that the capital injection and the guarantee are apt to fulfil the capital requirements as prescribed. The Commission therefore acknowledges that the measures, serving as means to reach the capital requirements as prescribed by the Austrian supervisory authority, are appropriate to preserve stability in Austria's economy.

The aid is proportionate and limited to the minimum

(24) As set out in the Banking Communication, the aid must be proportionate and restricted to the minimum necessary.

(25) In application of that principle a contribution from the beneficiary to the cost of the guarantee needs to be ensured.⁽¹⁾ An adequate remuneration is the best means to ensure such contribution and consequently a limitation of the aid to the minimum.

(26) The guarantee has the same impact as a capital injection as it relieves Austria as the owner of the bank from injecting itself the full amount of the capital needed. The guarantee therefore needs to be assessed applying the same principles as stipulated for a capital injection. In particular, the guarantee needs to be remunerated in line with the rules for the remuneration of recapitalisations set out in the *Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition*⁽²⁾ (Recapitalisation Communication).⁽³⁾

(27) The Commission deems 10% as appropriate starting point for the calculation of the guarantee fee as it is the requisite remuneration for core capital instruments for a distressed bank. The final coupon for the investors in the Tier-2 instrument will be determined in a book-building operation in the actual issuance of the bond. The Commission considers the determination of the coupon by means of a book-building process acceptable as that process is an appropriate means to determine the market price.

(28) As regards the discount of 2.3% the Commission bases its assessment on the Recapitalisation Communication which establishes as guiding principle for the remuneration of capital instruments that account needs to be taken of the risk profile of the beneficiary and the characteristics of the instrument chosen including its level of subordination. Consequently, the Recapitalisation Communication establishes as rates of return for fundamentally sound banks a price corridor between 7% (for subordinated capital) and 9.3% (for ordinary shares). Therefore, the Recapitalisation Communication applies a differentiation of 2.3% in light of the type of capital chosen.

(29) The Commission considers therefore appropriate to apply in the case at hand a discount of 2.3% on the subordinated capital instruments, taking account of the lower risk linked to Tier-2 instruments as opposed to core-Tier-1 instruments. The Commission therefore considers the total guarantee fee 7.7% minus the actual coupon of the issued instrument (and thus a total remuneration to be paid by HGAA of 7.7%) as appropriate.

(30) As regards the required remuneration of the recapitalisation in the form of ordinary shares, point 8 of the *Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis*⁽⁴⁾ lays down that the new shares should be subscribed at a discount to the market price prevailing at the time of the announcement. However, such a discount is not necessary in the present case as the State which is injecting the capital is the 100% owner of the bank; the State will therefore get the entirety of whatever dividends are ultimately paid out by the bank.⁽⁵⁾

(31) In conclusion, the Commission acknowledges that the aid is necessary in order to comply with the capital requirements prescribed by the supervisory authority. Given that the aid amount is calculated so as to achieve the regulatory requirements without going beyond that target capital ratio and the guarantee is properly remunerated, the measures seem limited to the minimum necessary to ensure regulatory compliance of HGAA.

Avoidance of undue distortions of competition

(32) The Commission notes positively the commitments provided by Austria for HGGA.

(33) The commitments limiting the bank's business activities, e.g. in terms of return levels, risk categories of customers and maturities, will contribute to limiting risky behaviour and therefore the possibility to expand business to the detriment of competitors. They will also help avoiding that new business generated by the bank creates obstacles to its restructuring, by adding new problems to the legacy ones. The commitments, e.g. regarding the loan-to-deposit ratio, will also support the intended sale of the remaining operative entities of the bank, in line with the last version of its restructuring/liquidation plan.

(34) The Commission further notes positively that as a result of those commitments HGAA will be subject to an acquisition, coupon and advertising ban.

(35) The Commission notes that the commitments contain mechanisms to minimize distortions of competition and the potential abuse of the preferential situation brought about by the aid. The Commission is therefore satisfied that competition distortions are avoided to the extent possible.

⁽¹⁾ See Banking Communication, points 25f.

⁽²⁾ OJ C 10, 15.1.2009, p. 2, points 23 and 27ff.

⁽³⁾ See also the assessment of a similar transaction in Commission Decision of 17 June 2009 in case N214/2009 Hypo Tirol, OJ C 270, 11.11.2009, p. 10.

⁽⁴⁾ OJ C 356, 6.12.2011, p. 8.

⁽⁵⁾ See also Commission Decision of 4 October 2012 in case SA.34716 (2012/N), Recapitalisation and restructuring of Hypo Tirol Bank AG, not yet published; Commission Decision of 28 November 2012 in case SA.33734 (2012/N), Restructuring of NCG, not yet published.

4.2.3. *Extension of the formal investigation procedure regarding the restructuring aid*

- (36) The formal investigation procedure into the restructuring of HGAA and the corresponding aid has to be extended with respect to the new measures. The compatibility of the aid will be assessed on the basis of the restructuring or liquidation plan to be submitted.
- (37) The Commission notes that additional aid has become necessary, which demonstrates that the previously submitted draft restructuring plan was not sufficient to restore the viability of HGAA. At present, it is doubtful that the plan in its current form tackles all the weaknesses of the previous plan. The Commission has also doubts about the quality of the new business generated by HGAA in 2011 and 2012; as a result, the behavioural commitments given by Austria seem necessary to avoid that the bank is aggravating its problems with new long-term, high-risk and/or low profitability business.
- (38) In addition, the Commission has doubts as to whether the envisaged divestitures are sufficient in both scope and timing to adequately limit the distortions of competition created by the totality of the aid that has been authorised temporarily for the bank. In that respect the Commission notes that, according to point 31 of the *Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules*⁽¹⁾, such measures must also reflect the amount of aid, which has significantly increased since the first aid was granted in December 2008.

5. CONCLUSIONS ON THE COMPATIBILITY OF THE AID AND THE EXTENSION OF THE OPENING PROCEDURE

- (39) The Commission considers the EUR 500 million capital injection and the guarantee on subordinated debt in favour of HGAA temporarily compatible with the internal market on the basis of Article 107(3)(b) of the Treaty until the Commission has taken a final decision on the restructuring aid.

- (40) In the light of the considerations above, the Commission has further decided to extend the proceedings laid down in Article 108(2) of the Treaty with respect to the above aid measures in favour of HGAA.

6. CONCLUSION

The Commission has accordingly decided

- to consider the aid to be temporarily compatible with the internal market;
- to extend the proceedings as laid down in Article 108(2) of the Treaty with respect to the above aid measures.

In the light of the foregoing considerations, the Commission requires Austria, within two months of receipt of this letter, to provide an updated restructuring plan. Otherwise the Commission will adopt a decision on the basis of the information then in its possession. It requests your authorities to forward a copy of this letter to the recipient of the aid immediately.

The Commission notes that Austria exceptionally accepts that the adoption of the present decision be in the English language.

The Commission wishes to remind Austria that Article 14 of Council Regulation (EC) No 659/1999 provides that all unlawful aid may be recovered from the recipient.

The Commission warns Austria that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

⁽¹⁾ OJ C 195, 19.8.2009, p. 9.

ANNEX

Commitments by Austria for HGAA

1. HGAA will limit all public finance and corporate credit engagements to [...] and with a credit rating of [...] or better (or having a 1-year default probability of [...] or less). All engagements above [...] in the corporate segment need to be [...] collateralized.
 2. HGAA will only disburse new retail mortgages with an LTV of [...] or lower. In addition, any mortgage granted should be eligible under the local covered bond law where such legislation exists.
 3. The internal funding cost matrix needs to be commensurate with the funding situation of the branch for the entire term structure. At the very minimum, this should be
EURIBOR 3m + [...] % for engagements up to [...] years,
EURIBOR 3m + [...] % for engagements [...] years (retail mortgages only),
EURIBOR 3m + [...] % for engagements above [...] years (retail mortgages only),
to be increased for countries with a particularly weak credit stance (Serbia + [...] %, Bosnia + [...] %, Montenegro + [...] %). In addition to the group-wide maturity restrictions in public finance and corporate finance (see point 1.), no engagements exceeding [...] years should be undertaken in these countries.
 4. After properly calculating the funding cost (according to 3.) and risk cost (as the cumulative expected loss on the uncovered amount, after applying an additional haircut of [...] on the collateral) an annual return on equity of a least [...] for any new credit engagement is ensured. The return on equity has to be calculated based on regulatory capital requirements allocated to the specific loans.
 5. Foreign currency loans are only provided to clients if [...]. The only exception to this are EUR-loans in [...].
 6. HGAA will ensure an annual re-rating and complete financial documentary follow up of each client with an exposure of more than EUR [...] equivalent, to be verified by risk management in the headquarters.
 7. HGAA will steer the credit process so that each entity not earmarked for wind-up has a loan to deposit ratio of less than [...] by end of 2013.
 8. HGAA will replace or re-train credit officers and relationship managers where flaws in the credit process have been discovered or where credits have been disbursed at sub-standard profitability levels.
 9. HGAA shall not acquire any shareholdings in companies or parts of companies ('shareholdings'). With the prior consent of the Commission, HGAA is allowed to acquire shareholdings where special circumstances require it to do so in order to maintain or secure financial stability or effective competition. HGAA may acquire shareholdings without the prior consent of the Commission where: (i) the respective acquisition price is less than [...] % of HGAA's balance-sheet total at the time of the Commission Decision, and (ii) the sum of all the acquisition prices paid by HGAA over the whole restructuring period (to be defined in the final decision) is less than [...] % of HGAA's balance-sheet total at the time of the Commission Decision. Excluded from the prohibition on acquisitions are shareholdings managed or acquired in the course of HGAA's normal business operations in connection with non-performing loans or similar banking operations.
 10. HGAA shall not use the aid for promotion purposes.
 11. HGAA shall not make coupon payments on equity instruments such as hybrid capital and sub-ordinated debt except if legally obliged to do so.
 12. The implementation of the above measures will be monitored on a quarterly basis through an external trustee who reports to the Commission.
 13. The Ministry of Finance will enter into a contract with HAA defining the premium to be paid for the state guarantee for the subordinated bond issue by the bank according to the following formula: $10\% (-) \text{ actual interest rate of the bond } (-) 2.3\% = \text{guarantee premium}$. The payment of the guarantee premium is independent from the profits of the bank as well as the recognition of the subordinated bonds as own funds in the meaning of the Austrian Banking Act."
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