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Tax Lawyers

EU Fiscal State Aid and the impact on the overall economic growth and fair competition

Athens, 20 April 2015



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Tax is our business

A single market: why and how?

Why?

- Historic background of the EEC (Treaty of Rome;1957)
- Stability in Europe
- Increase economic growth

How in general?

- Specialization
- One single market with free movement, no barriers and free access
- So, free access, thus:
 - No discrimination
 - No distortions and restrictions allowed
 - Fair competition (level playing field)
 - No State Aid



How in Tax?

- Harmonisation (CCCTB)
- Combating aggressive tax planning (OECD BEPS)
- Coordination (Exchange of information)
- State Aid

A level playing field: "All companies should pay their fair share of taxes"

European Commission lays bare Amazon tax deal with Luxembourg



State aid: Commission extends information enquiry on tax rulings practice to all Member States

Brussels, 17 December 2014

FINANCIAL TIMES

Germany beware

Anti-euro party could do real harm — WOLFGANG MUNCHALL, PAGE 12

Give us a break

Richard Branson's big holiday offers is a bad deal — LUCY KILLAMBY, PAGE 16

Russian crunch

Sanctions are hitting sectors from food to cars — PAGE 7

Crackdown in HK as China's anxiety grows

Thousands of democracy activists gathered in Hong Kong on Monday to protest against the government's crackdown on dissent. The protesters, who were mostly young people, held up signs and banners in support of democracy and human rights. The government has been accused of targeting activists and journalists, and of restricting freedom of expression.



Briefing

- **India's reform bill** by a bill of 100 amendments to the constitution to give the government more powers to regulate the economy. ...
- **Modi led off at Malabo-Square** the Indian prime minister's visit to Equatorial Guinea to mark the 50th anniversary of the country's independence. ...
- **Japan's SoftBank eyes DNA** will look to build a pipeline network in the Arctic. ...
- **Turkey's Erdogan to lead TV fight** the independent TV group to demand the government to allow more competition. ...
- **Cable operator wants to do the edge** of the network. ...
- **China's reform on back** the government's plan to reform the state-owned enterprises. ...
- **India's labor union** against the government's plan to reform the labor market. ...

Apple hit by Brussels findings over Irish backroom tax deals

European Commission to accuse Ireland of providing illegal state aid to the iPhone maker

The European Commission has accused Ireland of providing illegal state aid to Apple, the iPhone maker, by allowing the company to use a special tax scheme to reduce its tax liability. The Commission found that the Irish government had granted Apple a special tax scheme that allowed it to pay a lower rate of tax than other companies. This was found to be illegal state aid under EU law. The Commission is now considering whether to force Ireland to recover the aid from Apple.

UK party membership

Party	2010	2011	2012	2013	2014
Labour	2,100,000	2,000,000	1,900,000	1,800,000	1,700,000
Conservative	1,800,000	1,900,000	2,000,000	2,100,000	2,200,000
Liberal Democrat	1,200,000	1,100,000	1,000,000	900,000	800,000
Green	300,000	300,000	300,000	300,000	300,000
UKIP	100,000	200,000	300,000	400,000	500,000

European commission to investigate tax affairs of Apple, Starbucks and Fiat

It is particularly important that large multinationals pay their fair share of taxes, regulator Joaquin Almunia says



The European commissioner Joaquin Almunia said he was concerned special treatment may have been granted to the firms. Photograph: Yves Loghe/AP



Special Tax Committee appointed by the European Parliament

- The European Parliament decided on 12 February 2015 to install a special tax committee named “TAXE - Tax Rulings and Other Measures Similar in Nature or Effect”
- Task to research tax rulings and other measures since 1991
- It will review role and work done by the EU Commission
- Commission has 45 members
- Duration 6 months
- On March 30, 2015, members of the TAXE special committee held a joint exchange of views with ECON committee to hear Commissioner Moscovici.
The debate focused mainly on the Commission's proposal as regards mandatory automatic exchange of information in the field of taxation as well as the Communication on tax transparency to fight tax evasion and avoidance.
- Still no agreement on approach



Alain Lamassoure (Chair)

What is State Aid - Article 107(1) TFEU

A (tax) measure constitutes state aid if 4 criteria are met:

1. The aid is financed by the use of State resources;
2. The aid must have an effect on trade and competition between member states;
3. The aid must confer an advantage to the recipient; and
4. The aid must be selective.

Consequences of State Aid:

Repayment over a period of 10 years plus interest

Examples of Tax Related State Aid Case Law

- Frucona Košice v Commission, CJEU 26 January 2013, case C-73/11 (Cancellation of 65% of a tax debt in a collective bankruptcy procedure)
- CJEU Belgium and Forum 187 v. Commission, CJEU 22 June 2006, C-182/03 and C-217/03 (Belgian Coordination Centre regime)
- P Oy, CJEU 18 July 2013, case C-6/12 (Derogation provided for in Finnish law from rules on the limitation of loss carry forward in case of a change in ownership)
- Autogrill Espana v Commission, General Court, 7 November 2014, T-219/10 (Spanish amortization scheme of goodwill in relation to foreign subsidiaries acquired) See also Finanz Amt Linz, pending case (C-66/14), only depreciation for domestic subsidiaries
- Netherlands Maritime Technology Association vs. Commission, 9 December 2014, T-140/13 (Spanish scheme of early depreciation of certain assets acquired through financial leasing)
- Gibraltar II, CJEU 15 November 2011, case C-106/09 (Offshore regime)
- Royal Scandanavian Casino Aarhus, T-615/11, General Court, 26 September 2014 (indirect tax, online gambling taxed at a lower rate than traditional gambling)
- Aer Lingus Ltd T-473/12 and Case T-500/12 Ryanair Ltd, General Court, 5 Febr 2015 (indirect tax, airport tax, domestic flights taxed with lower amount)

Differences between Code of Conduct and State Aid

- Although the two procedures pursue, to a certain extent, the same goal of reducing distortions of competition within the internal market, they are not identical.
- The key target of the EU Code of Conduct is to, inter alia, prevent tax base erosion between Member States.
- The purpose of State Aid provisions is to prevent situations where competition and trade between companies in the EU internal market are affected (fair competition between companies).
- The two procedures rely on different criteria and it is, therefore, quite possible for a measure that does not constitute State Aid to be found harmful under the EU Code of Conduct and vice versa

State Aid or Code Conduct? State Aid or Fundamental Freedoms?

- Hybrid structures:
 - No State Aid as usually no selectivity and advantage results from disparities
See no-aid decision of EU Commission re NL Group Interest Box; C4/2007, 08.07.2009)
See also Amazon case (tax exempt Luxembourg partnership)
- Unlawful State Aid or violation of one of the four fundamental freedoms?

Finanzamt Linz, Case C-66/14, pending case, opinion AG expected 16 April 2015

Questions referred

- 1. Does Article 107 TFEU (ex Article 87 EC), in conjunction with Article 108(3) TFEU (ex Article 88(3) EC), preclude a national measure under which, in the context of group taxation, goodwill is to be amortised in the case where a holding is acquired in a domestic company — thereby reducing the basis of assessment for tax purposes, and hence the tax burden — whereas such amortisation of goodwill on acquisition of a holding is not permissible in other cases of income and corporation tax?
- 2. Does Article 49 TFEU (ex Article 43 EC), in conjunction with Article 54 TFEU (ex Article 48 EC), preclude legal provisions of a Member State under which, in the context of group taxation, goodwill is to be amortised in the case where a holding is acquired in a domestic company, whereas such amortisation of goodwill may not be carried out in regard to acquisition of a holding in a non-resident corporation (in particular, a corporation established in another EU Member State)?

**Recent EU State Aid
cases initiated by
the EU Commission**

EC State Aid review - Ruling Practices – The Netherlands

1

The individual ruling issued by the Dutch tax authorities on the calculation of the taxable basis of the Netherlands for manufacturing activities of Starbucks Meridian Holding EMEA BV.

(IP/14/663 11 June 2014)

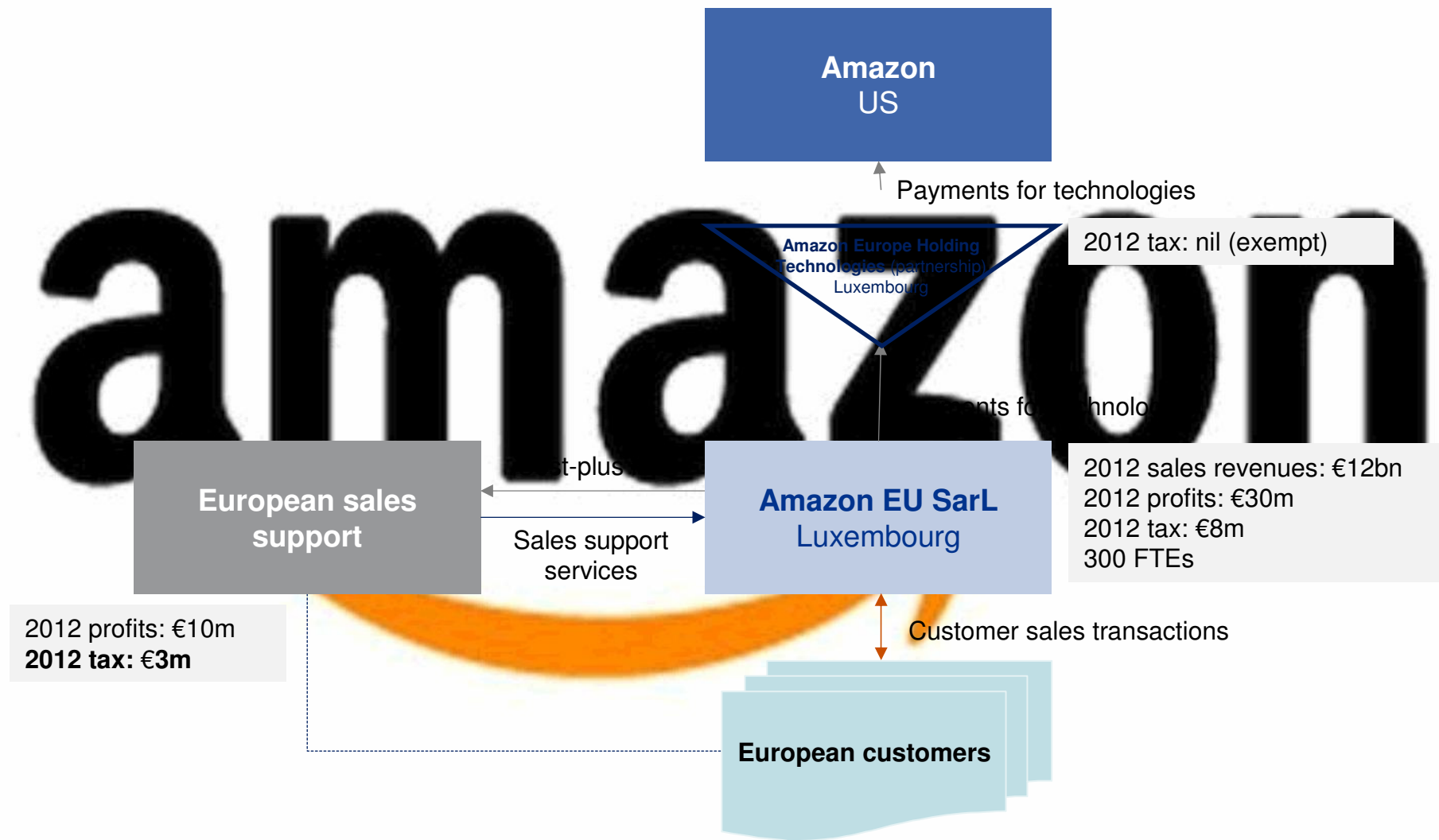
2

- Regarding tax rulings, the Commission notes that the Netherlands seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer.
- The Commission therefore does not expect to encounter systematic irregularities in tax rulings.

Starbucks case

- The individual ruling issued by the Dutch tax authorities on the calculation of the taxable basis in the Netherlands for manufacturing activities of Starbucks Manufacturing EMEA BV (IP/14/663 11 June 2014).
- Issue around variable royalty that can even be negative
- Regarding tax rulings... the European Commission notes that the Netherlands seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer.
- The European Commission therefore does not expect to encounter systematic irregularities in tax rulings.
- Is this a State Aid issue or an 'just' an issue where the tax authorities would have acted differently had they received more information?

EC State Aid review - Ruling Practices – Luxembourg



EC State Aid review - Ruling Practices – Luxembourg

1

'pay a large portion of its income to a non taxable partnership'

2

For 'unclear' IP rights a royalty was paid which was is not linked to the value of the intellectual property rights

3

The functions performed by the Luxembourg operating company were much more complex than reported by Luxembourg, whereas margins were significantly lower than e.g. Starbucks and Apple.

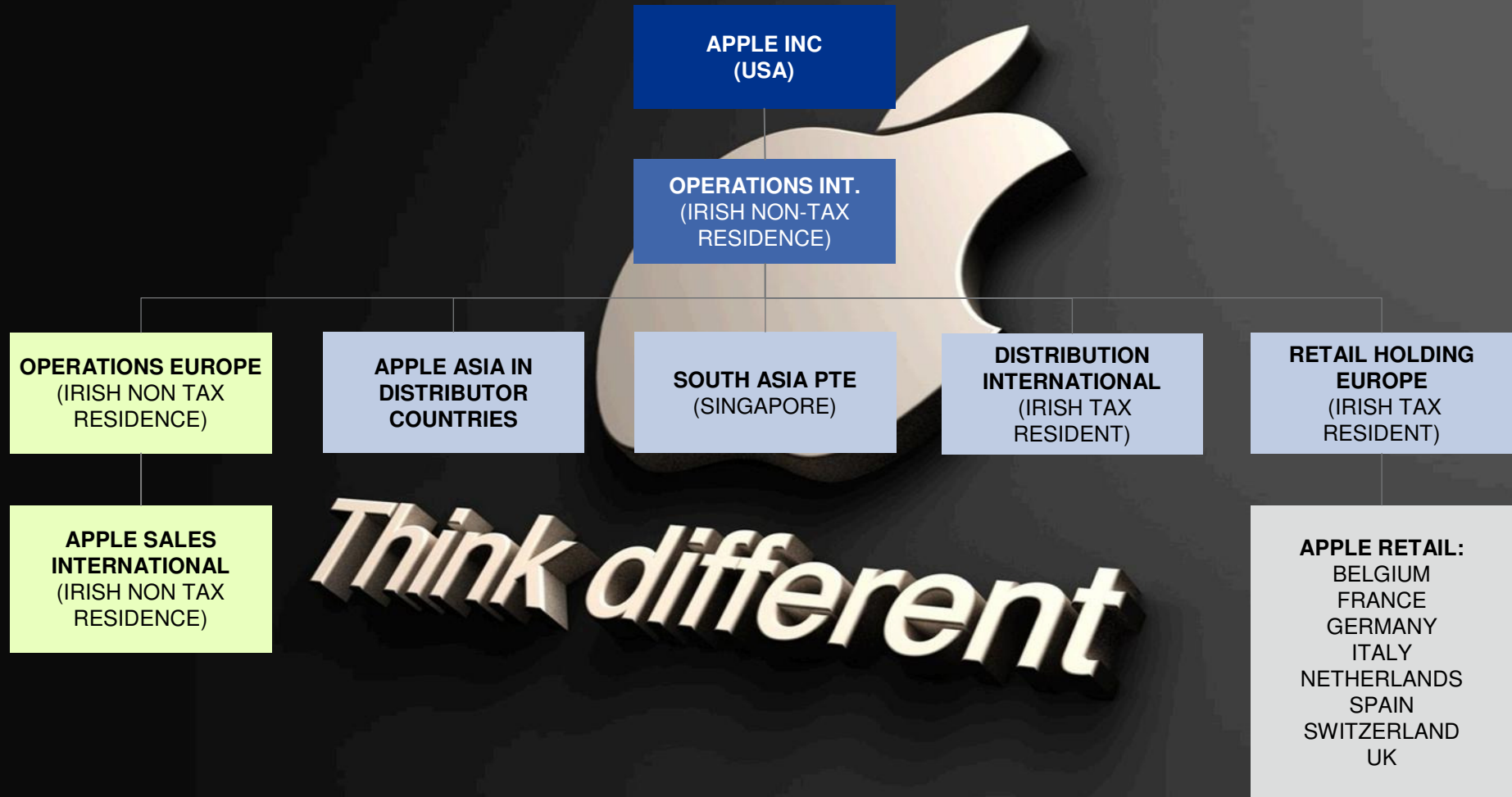
4

The ruling request was assessed at very short notice (within 11 days) and its duration (more than 10 years) was unusually long when compared to rulings in other Member States.

*Source: European Commission Press Release IP/14/1105 7 October 2014

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EC State Aid review - Ruling Practices – Ireland



EC State Aid review - Ruling Practices - Ireland

1

(58) the taxable basis in the 1991 ruling was **negotiated** rather than substantiated by reference to comparable transactions.

2

(59) **no transfer pricing report** was included in the documents provided by the Irish authorities to support the calculation of taxable profits.

3

The method proposed by the tax advisor and accepted by Irish Revenue in the 2007 ruling for profit allocation (TNMM, with operating costs [...] as a net profit indicator) ... is **neither explained** by the tax advisor nor by Irish Revenue.

4

(65) ...this ruling was applied by Apple **for fifteen years without revision**. The open-ended duration of the 1991 ruling's validity calls into question the appropriateness of the method agreed given the possible changes to the economic environment and required remuneration levels.

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Belgian Excess Profits Ruling (EPR) – Commission Observations (IP/15/4080, 2 February 2015)

- Background of the EPR: Synergies are being exempted in order to pro-actively avoid double taxation. Considering the uncertainty around the allocation of synergies within a group, the EPR aims at only taxing what a Belgian company would have earned on a stand-alone basis.
- The excess profit ruling only seems to benefit multinational groups, while Belgian companies which are only active in Belgium cannot benefit.
- The European Commission doubts whether art. 185, §2, b) only implements the general arm's length principle of the OECD.
- The Commission is worried that the excess profits as determined in the rulings significantly overestimate the actual advantages of being part of a multinational group. They usually amount to more than 50% to even 90% of profits.
- The Commission's assessment so far concludes that the Belgian "excess profit" tax system cannot be justified by the objective to prevent double taxation. This is because the deductions in Belgium do not correspond to a claim from another country to tax the same profits.
- The European Commission deduces from the administrative practice that the rulings are often granted to companies which have relocated a substantial part of their activities to Belgium or which have made considerable investments in Belgium.

Belgian Excess Profits Ruling (EPR) - Observations

- Elements of selectivity in the EPR-regime:
 - Ruling required
 - Not possible to take the position in the tax return
 - Only available to multinational companies
However, arm's lengths system is the system of reference, also only applies to multinational companies.
Also, the Dutch group interest box was only beneficial to multinationals but not considered to be state aid.
However, Gibraltar off-shore regime was considered to be unlawful
- Consequences for Dutch informal capital rulings?
 - Similar consequences Belgian system in that part of profits remain untaxed
 - Different however in that:
 - Based on Dutch law and Supreme Court case law
 - No ruling required, position can be taken in the return without a ruling
 - Possibility to challenge decision of tax administration at Dutch Courts
- Important in both cases:
 - The amount of the excess profits / informal capital contribution must be thoroughly supported and documented (by an in-depth transfer pricing study).
 - There should be no link between employment or investment and the excess profit / informal capital contribution.

EU State Aid -

Tax Ruling Practices -

Observations

Indicators of State Aid and Other Remarks

Indicators of State Aid

1. Apparent discretionary power (fixing base/rate)
2. Reverse engineering (taxable base determines facts)
3. Long period / open-ended period without review
4. No underlying transfer pricing documents.
5. Tax authorities, without any investigation, easily accept the requested outcome
6. Negotiating link between taxable base and certain minimum investment (employees or capital)

Other Remarks

1. In case a state-aid decision is challenged at the ECJ, the ECJ will only analyze whether the decision of the Commission is reasonable in case of a legally correct analysis
2. EU Commission assumes that a company goes for maximizing profit ('prudent independent market operator'). The OECD rules provide for a range.
3. All 4 cases against specific companies concern US multinationals and only transfer pricing is addressed and not hybrid mismatches.
4. Driving force seems to be Germany and EU moves forward ahead of BEPS



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