

GUIDELINES FOR THE ESTABLISHMENT OF A CONSUMER CROSS-BORDER ADR ORGANIZATION IN THE EU, ICELAND AND NORWAY

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Abstract

In May 2013 *a directive on alternative dispute resolution (ADR) for consumer disputes* was adopted by the European Union (EU). The directive declares a necessity for all EU Member States to secure the creation of a residual ADR organization that deals with disputes for the resolution of which no other specific ADR organization is competent in order to ensure full sectoral and geographical coverage by and access to ADR organizations. This research reveals that in order to fulfil the European Commission (EC) requirements, at least 72 % of the EU Member States will have to create a new ADR organization or reorganize their existing ones. However, the directive does not specify what types of ADR organizations are desired or which of them work best. Therefore in this article some *guidelines for the establishment of a consumer cross-border ADR organization* will be developed. The aim of the guidelines is to propose the framework of an ADR organization that would successfully solve consumer disputes, including cross-border disputes, and thus, increase the consumers' confidence in turning for help in these organizations.

Keywords: Consumer protection, alternative dispute resolution

Introduction

The *Europe 2020 Strategy* calls for "citizens to be empowered to play a full role in the single market", which "requires strengthening their ability and confidence to buy goods and services cross-border". (European Commission, 2010, 20; European Commission, 2011a, 2) Thus the European Commission (hereafter the *EC*) considers that improving consumer confidence in cross-border shopping by taking appropriate policy action could provide a major boost to economic growth in Europe, because empowered and confident consumers can drive forward the European economy. (European Commission, 2012a, 2) Thereby empowerment requires

that consumers can confidently exercise their European Union³² (hereafter the *EU*) rights across Europe and that, when something goes wrong, they can count both on the effective enforcement of those rights and on easy access to efficient redress. (European Commission, 2011a, 2)

The EC has established different means to ensure a high level of consumer protection all over the EU and it considers that one of the most appropriate consumer cross-border redress methods is *alternative dispute resolution* (hereafter *ADR*). (Commission of the European Communities, 1993) ADR organizations are known as out-of-court mechanisms that have been developed to help the citizens to solve their disputes arising in connection with violation of consumer rights, but where consumers themselves have been unable to reach an agreement directly with the trader. (Atlas & Huber, 2000, 2, 20) The advantages of ADR organizations to be considered are that they offer more flexibility, are cheaper, quicker and more informal than going to court and can better meet the needs of both consumers and traders. (DG Sanco, 2013)

According to a DG Sanco study carried out in 2009, there are 750 consumer ADR organizations available in the EU. These organizations have been developed according to each country's national characteristics, thus creating different working principles of ADR organizations in each EU Member State. (DG Sanco, 2009; European Consumer Centre Denmark, 2009)

Several studies have shown that despite a large number of the consumer ADR organizations, their limited competences do not allow the consumers to seek help in case of all kinds of the consumer problems. (DG Sanco, 2009; European Consumer Centre Denmark Denmark 2009) Therefore the EC committed to propose measures that would enable all consumer complaints to be submitted to one of the ADR organizations. These measures were a part of the new ADR directive. (Council Directive 2013/11/EU) It stipulates, that the Member States have to ensure that all disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to the authority, that can ensure objective, transparent, effective and fair alternative dispute resolution procedures. In order to fulfil this obligation, a permanent ADR organization should be established, that would be competent in the resolution of such disputes that are not the within the competences of any other ADR organization. The EC also notes, that a well functioning national system of ADR organizations has to be created in order to be successful in the

³² Although since 1st July 2013 Croatia became the 28th Member State of the European Union, in this article when referring to the European Union, only 27 Member States are considered and studied.

resolution of the consumer cross-border complaints. (European Commission, 2011b, 6)

However, the directive does not specify what types of ADR organizations are desired or which of them work best. The quality working principles for the ADR organizations developed by the EC are quite comprehensive, but mostly unrelated to the organizational aspects. To facilitate the process of the ADR organizations' establishment or reorganization appropriate for the consumer cross-border dispute resolution for the Member States, in this research some *guidelines for the establishment of a consumer cross-border ADR organization* are developed. The aim of the guidelines is to propose the framework of an ADR organization that would successfully solve the consumer disputes, including the cross-border disputes, and thus increase the consumers' confidence in turning for help to this organization.

The article is created from empirical, quantitative and qualitative research perspectives using primary³³ and secondary data³⁴. Organizational principles, when developing the framework of an ADR organization, are chosen by using a *national consumer ADR organization system classification* (Knudsen & Bălița, 2013) and categories of *classification of consumer ADR organizations* (Knudsen, 2011a; Knudsen, 2011b).

Framework of an ADR organization

Although it is generally considered that ADR organizations are developed differently across the EU creating different working principles in each EU Member State, the latest research has revealed that in the EU, Norway and Iceland overall 7 different working patterns of ADR organizations exist that countries have developed over time. (Knudsen & Bălița, 2013) These 7 working patterns also known as a *national consumer ADR organization system classification* are the *sectoral system* (available in Cyprus, France, Ireland, Luxembourg, Malta Slovakia and United Kingdom), the *regional system* (available in Spain and Hungary), the *sectoral–regional system* (available in Austria, the Czech Republic, Germany, Poland and

³³ Data was collected in an empirical research from august 2011 until January 2012 using an online questionnaire which was designed to retrieve information on ADR organization performance regarding consumer cross-border complaint resolution as well as their prospects of their future development. After qualitative analysis of ADRs across the EU, a questionnaire was sent to 614 ADRs in the EU, Iceland and Norway. In total 89 ADR organizations responded and 61 ADR schemes answered the questionnaire and shared their views on their previous performance and future development possibilities regarding consumer cross-border complaint resolution. When analyzing the results, the data statistical analysis method and the analytical method were used.

³⁴ Data are used from following sources: DG Sanco, 2009; European Parliament, 2011; European Commission, 2006; European Commission, 2007; European Consumer Centre Denmark, 2009; Nordic Council of Ministers, 2002; Reilly, 2004; Rozdeicze, 2006

Portugal), the *centralized system* (available in Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden), the *mixed system* (available in Belgium and Slovenia), the *umbrella system* (available in Greece and Norway) and the *fragmented system* (available in Italy). Research noted as well that Bulgaria and Rumania did not fall under any of the elaborated systems as they were the last ones to start development of ADR organizations in their countries and it was yet difficult to determine their development strategy when the research was carried out. These systems mostly are based on sectoral and geographical competences. In countries where centralized or fragmented systems exist, consumers have a possibility to find at least one ADR organization which is competent in solving their dispute. However in the remaining 72 % of Member States where sectoral, regional, sectoral-regional, mixed or umbrella system exist, a lack of sectoral or regional coverage causes consumers difficulties to find competent ADR organization for any solution of their dispute.

The successful coverage of a centralized system was confirmed as well by additional examination of the pattern of transferred consumer cross-border disputes to competent ADR organizations. In order to facilitate the consumer access to these ADR organizations, the EC has established the EU-, Iceland and Norway wide European Consumer Centre Network (hereafter ECC-Net), what can help consumers with a cross-border complaint to find the most appropriate ADR organization in another EU country. (European Commission, 2012b) From almost 47 000 complaints received in the ECC-Net in 2007-2011 only 5,6% were forwarded to competent ADR organizations and from these amicable settlements were only reached in 25 % of the cases. (European Consumer Centre Network, 2012) Data revealed as well that most consumer cross-border disputes are transferred (10% or more from all transferred cross-border disputes) during the five years (2007-2011) in countries where a centralized ADR system exists and in some countries where a sectoral-regional system is available, which could be explained by the ADR organization existence in areas where consumers complain most. (European Consumer Centre Network, 2012) Further examination of the ADR procedures used in the centralized system according to categories used in the *consumer ADR organization classification* revealed that the most often used dispute solution procedure is a consumer complaint board, where trader participation in the procedure is mandatory. Another common characteristic of ADR organizations in the centralized system were their type of organization and funding, that was mostly public or mixed.

However, besides the coverage issues, other studies have shown that for consumers, who are exposed to cross-border disputes, there are a number of other conditions that are significant to them. It is important for consumers to know that they have access to the organizations where they can quickly

and easily get help and that the dispute will be solved quickly and the procedure is simple and understandable, that the settlement of a dispute is free of charge or very cheap, the trader will take part in the procedure, and execute decisions, so that the whole time and work invested successfully pays off. (Kramer, 2008; European Commission, 2009) These principles are highlighted in the EC Recommendations 98/257/EC and 2001/310/EC as well as in new ADR directive (Council Directive 2013/11/EU), therefore further development of guidelines will be based on the above mentioned principles and considering principles of national consumer ADR organization system classification and consumer ADR organization classification.

Guidelines for establishing a consumer cross-border ADR organization

This research indicates that in order to be able to implement the ADR directive and meet the EC requirements and provide the consumers with the opportunity to solve any kind of cross-border disputes, at least 72 % of the EU Member States will have to create new or reorganize their existing ADR organizations.

Based on the analysis of the ADR organization working principles in the centralized system as well as considering principles important to consumers, *the guidelines for the establishment of a consumer cross-border ADR organization* were developed that are summarized in the table below (Table 1) that provide evaluation of preferable ADR organization working principles advantages and disadvantages and is followed by detailed description of each working principle.

Table 1. The guidelines for establishment of a consumer cross-border ADR organization

Stipulation	Preferred working principles	Advantages and disadvantages
<i>System type</i>	Centralized System	+ Easier to promote recognition. + Easier to identify, locate and contact. - In several countries it is difficult to reorganize their present system to a centralized system.
<i>Organization type</i>	Public or mixed	+ Longer and more stable existence and operation. + Broader sectoral coverage. + Can handle disputes against more traders. + Objectivity.
<i>Funding type</i>		+ Funded by those traders who violet the consumers' rights. - Unstable economic or political situation in the country may affect the organization's existence and quality of performance.
<i>Geographical competence</i>	If possible, national	+ A smaller amount of ADR organizations in country.

Stipulation	Preferred working principles	Advantages and disadvantages
<i>Sectoral competence</i>	Cross-sectoral, with widest sector coverage range possible	+ Wider competence of complaints in consideration. - General knowledge in different sectors can affect the quality of making decisions.
<i>Origin of the complaint</i>	At least partially cross-border	+ Foreign consumers can turn to for help. - Additional resources can be required to improve case handlers' competencies in cross-border disputes solution, e.g., to learn foreign languages.
<i>Character of trader participation</i>	Mandatory	+ Consumers can complain about all traders. + Complaint resolution can be initiated without the agreement and the presence of the trader. - Cannot be applied to a mediation procedure.
<i>Character of decision</i>	Binding in countries where it is necessary	+ More traders implement made decisions. + More consumers are turning to ADR organizations for help. - Traders can continue to appeal the made decisions in the higher courts.
<i>Participation fee</i>	No fee or minimal fee, which would be conformable to consumer welfare level in all EU countries	<u>Free of charge procedure:</u> + Do not withhold consumers to turn after help. - ADR organizations resources used for solution of small value complaints. <u>Procedure for a minimal fee:</u> + Save ADR organization resources on solution of small value complaints. - Can withhold consumers to turn after help.
<i>Limitations of value of the dispute</i>	No limitation or limitation acceptable to consumer welfare level in all EU countries	+ Save ADR organization resources on solution of small value complaints. - Can withhold consumers to turn after help.
<i>Celerity of complaint solution</i>	Maximum short without losing quality, however no longer than 3 months from receipt of the complaint.	+ Motivates consumers to start the ADR procedure. + Procedures cannot be extended until they have lost meaning. - May threaten the quality of a dispute solution.
<i>Simplicity of the procedure</i>	A simple and easily explained procedure, where all processes can be provided online.	+ Consumers understand the procedure and do not refuse to participate because of their complexity. + Online communication ensures low price and speed procedures. - Simplicity and procedures implementation for online use may reduce the quality of the

Stipulation	Preferred working principles	Advantages and disadvantages
		procedure.
<i>Accessibility</i>	Information and communication is available in English and information is regularly updated.	+ More submitted and solved cross-border complaints. - More resources for cross-border dispute solution may reduce the quality of the resolution of national disputes.

Source: Author's creation

System Type

Overall the research indicates that the best ADR organization competence coverage has a centralized system where a central ADR organization with a national competence exists that is dealing with consumer complaints in almost all matters, except for some specific sectors where additional ADR organization are established. This system ensures that consumers can turn for a help to ADR organizations almost in any type of disputes and that competences of ADR organizations in different sectors do not overlap. Additionally promotion as well as explanation of working principles to consumers and traders of one central ADR organization is easier than of countless small ADR organizations. (European Parliament, 2011)

Establishment of an ADR organisation, which has competence in areas not covered by other ADR organizations in the country, is also required in the new ADR directive, thus it can be seen as a contribution to the establishment of a centralized system across the EU. However, not all systems by the addition of one extended competence ADR organization will contribute to the establishment of a centralized system and not for all systems a central ADR organization is possible or necessary. For example, in general an upgrade of the sectoral system with an extended competence ADR organization will contribute to the establishment of a centralized system, while for other systems full reorganization of their systems is necessary to ensure a centralized system. In few countries the existing system is established in a way that ensures a wide sectoral and regional coverage in main consumer complaint areas. Where this is the situation reorganization into a centralized system is not necessary. However, prior to supplementing existing systems and / or reorganizing it, one has to carefully assess its advantages and disadvantages and choose the most appropriate way how to ensure maximum coverage of sectors and regions, at the same time encouraging the performance of existing ADR organizations in the way it is provided by centralized system.

Type of organization and financing

ADR organizations' type of organization and funding are closely related. Consumer organizations often lack the resources to build ADR organizations with general competence, so they require support from the government and / or traders. However, traders are more positive to finance the development of ADR organizations with specific competence rather than with a national cross-sectoral competence. (European Commission, 2007, 97) This is confirmed as well by this research, which indicate that most ADR organizations in centralized system with cross-sectoral competences are public or mixed organizations and with public or mixed funding.

Therefore, an ADR organization, which would have a national and cross-sectoral competence, should be established as a public or mixed organization with public or mixed funding, thereby ensuring long-term existence, impartiality and resolution of disputes in as many sectors as possible. Additionally, mixed financing, where traders are involved in financing, should be ensured by dispute resolution fee required from traders for case handling process instead of generally accepted practice - involving traders' associations³⁵. When trader associations are used, often only a small number of traders are members of these associations and thus participate in and comply with the decisions made by ADR organizations. These traders are as well helping to finance the ADR organization in a certain sector, however consumers who need help from these ADR organizations may turn to them only if a trader, who is involved in the dispute, is a member of this association. Thus it creates a practice where traders who are complying with consumer rights have to pay additional costs to help finance ADR organizations and where traders who are not considering and violating consumer rights do not have to pay such additional costs. Therefore to increase a fair competition, this practice should be changed. For example, in Denmark, in cases where a consumer has not been able to obtain an amicable settlement with a trader and has turned for help in ADR organization, if ADR organization has come to a decision that the trader has violated the rights of the consumer, then the trader has to bear the costs of the dispute (for example, the Danish Telecommunications Complaints Board has established a flat rate of 3,500 Euro). This practice encourages traders to resolve disputes with consumers before they reach ADR organizations. Thus, this practice can help to ensure that ADR organizations are funded solely by those traders that lead consumers to complain about them, instead of those that respect the

³⁵ There are some of the ADR organizations that are financed by (and work under) trader associations that exist in certain sectors. Trader associations are sponsored by traders who are members of these associations. Traditionally ADR organizations that are working under certain trader association can accept and deal with complaints only against the traders that are members of these associations.

rights of consumers. Surely, this practice has to ensure that ADR organizations are at all times objective.

Sectoral and geographical competence

This research has revealed that to ensure the best coverage, ADR organizations should have a national and cross-sectoral competence covering as many sectors as possible in countries with centralized ADR systems. This research as well as the European Parliament study both have shown that for the consumer it is easier to find help if the country has one central ADR organization rather than countless small ones. (European Parliament, 2011) Therefore in countries where ADR organization competences are really limited, it is desirable to build one or a few central ADR organizations that would be responsible for main complaint areas, such as in Sweden the National Board for Consumer Disputes or in Latvia the Consumer Rights Protection Centre, which are competent to deal with the majority of consumer complaints. As noted by the Swedish National Board for Consumer Disputes representatives, they are not particularly concerned about the promotion of their institution as all the Swedish consumers are aware of their organization³⁶.

It should be noted, that in the same European Parliament study, it was proposed that for countries with several different ADR organizations that have specific sectoral or regional competences, it would be desirable to gather them under one umbrella organization as the promotion of it among consumers and traders is considered to be easier than promotion of a myriad of small ADR organizations. (European Parliament, 2011) That would ensure as well that the consumers have to be only informed about and turn for help to the umbrella organization, which afterwards would forward complaints to the competent ADR organizations. However, the results of this research indicate that the umbrella system is not functioning as well as a centralized system and there are a number of important sectors, where consumers have no possibility to obtain help regarding their disputes from ADR organizations.

The creation of such central ADR organization with general competence that can deal with cross-border consumer complaints will also ensure the functioning of ECC-Net in accordance with its operational guidelines as for case handlers of ECC-Net it will be easier and faster to identify and forward almost all the complaints to competent ADR organization.

³⁶ Comments are given by representatives of the Swedish National Board for Consumer Disputes in an empirical research made by the author of this article.

Character of trader participation and character of decision

Several studies (Lehofer-Kessler, 2005; European Consumer Centre Denmark, 2009) suggest that one of the major challenges that withhold ADR organizations from successful performance is traders' unwillingness to participate in ADR procedures or implement ADR organization's decisions. Studies are indicating that one of the key ingredients to successful performance of ADR organizations is to ensure traders participation in ADR procedures and implementation of the decisions. It is one of the most important things that can contribute to consumers' willingness to participate in ADR procedures as well. ADR organizations, that make decisions which traders do not implement, are of no use to consumers neither they encourage consumers to trust them. (Lehofer-Kessler, 2005)

However, not in all countries binding decisions have to be made, for example, in the Scandinavian countries ADR organizations often make recommendatory decisions, yet as indicated by several studies traders traditionally implement these decisions. (Reilly, 2004; European Consumer Centre Denmark, 2009) As recommendatory decisions are not implemented in all countries, which is determined by different cultural and economic circumstances, in order to ensure that traders comply with the rights of consumers, in some countries ADR organization decisions have to be made binding.

Therefore, when establishing new or restructuring existing ADR organizations, it should be ensured that traders participation in the procedures is mandatory (except in the mediation process, where it contradicts the nature of the process) and in countries where implementation of recommendatory decisions is low, it should be ensured that ADR organizations can make binding decisions with possibility to appeal them in the relevant administrative court. This could be achieved through establishing an appropriate legislation and statutes of ADR organizations. However, as it is not always possible to make traders participation in procedures mandatory or for ADR organizations to make binding decisions, the alternative is to create incentive measures to ensure similar results. For example, Member States could consider the introduction of trader *blacklists* or *trust marks*, thus identifying to consumers the most reliable traders and motivate traders to participate in ADR procedures, implement their decisions as well as to respect the rights of consumers.

Gradually, ensuring traders participation in ADR procedures and providing ADR organizations with a possibility to make binding decisions in those countries where it is necessary across the EU, it would increase not only consumer confidence in ADR organizations and encourage them to use these procedures, but to purchases goods and services in other EU Member States as well.

Cost and time consumption

Dispute settlement costs and time consumption for consumers are important. Since ADR organizations advantages compared to the court, are considered to be low costs and speed, then in order to ensure that ADR organizations should provide free of charge services or offer them at a very low cost, it does not become an obstacle to the consumer's desire for justice.

Although the results of empirical research indicated that the majority of ADR organizations across the EU offer free of charge services, there is a number of ADR organizations that charge up to 303 Euros (required fee sometimes can depend on the value of consumer complaint), hence already exceeding the amount which the consumers would be willing to pay. However, the introduction of payment also can have its advantages, because it can serve as a regulatory mechanism for filtering out small value complaints and saving resources for dealing with more valuable complaints. If this is the reason for the introduction of a fee, it can also be achieved by introducing a minimum and maximum value limitation of the complaint, which was done already by 10% of respondents in the empirical research. Such a filtering mechanism can be valuable because practice show that there are consumers who are starting a cross-border dispute resolution process for 5 Euros worthy corkscrew. Still, in this case the difficulties could cause determination of an appropriate minimum and maximum limitation which would meet all EU Member States consumer's standard of living. Therefore, in order to clarify that, before the introduction of such service fees and limitations to complaints value, additional study should be carried out across the EU.

If a fee is required to ensure functioning of ADR organization financially, then a fee could be required from traders as it is done by Danish ADR organizations. As mentioned, in situations where a consumer has complained regarding a trader in ADR organization and it is recognized that the trader has violated consumer rights, the trader has to compensate not only the consumer, but also the costs of the procedure. However, if a consumer complaint has proved to be unfounded, the trader does not have to pay anything. In such way, traders are motivated to try to resolve disputes with consumers before they reach ADR organizations and ADR organizations are able to save resources and focus on serious disputes.

Regarding the celerity of the dispute resolution process, the results of the empirical research indicate that the resolution of a dispute takes more than one month in 68% of the ADR organizations and in 42% it takes three months or longer. As stated in the new ADR directive, in future, ADR organizations are required to resolve disputes within three months, indicating that this is the maximum time that can be considered acceptable. However, despite stated deadlines ADR organizations should try to resolve disputes as

fast as possible without compromising the quality (objectiveness, thoroughness etc.). Of course, to be able to do so, a sufficient number of employees is required proportionally to the number of incoming complaints, as well as the successful procedures, that are determined by the organization's funding, type and other organizational aspects.

Organizations availability and simplicity

The results of an EC study indicate that access to ADR organizations and easy understandable procedures correlate with the number of consumers who use ADR organizations services. If a consumer cannot find a competent ADR organization where to turn for help fast enough, he gives up and never gets the issue solved, leaving the consumer unsatisfied. If this has occurred during a cross-border dispute, there is a high possibility that in the future the consumer will be discouraged to purchase goods and services abroad and will purchase them further only in his own country, even if he will have to pay more. (European Commission, 2009) Therefore the accessibility of ADR organizations is important.

One of the ways to promote the accessibility of ADR organizations is already mentioned – the creation of a centralized ADR system in the country. Another way to increase the accessibility of ADR organizations in cross-border consumer disputes is to provide information regarding ADR organizations in other countries (their skills, contact details, particularly websites and e-mail address etc.) and publish it in popular consumer web sites. As revealed in other study (Knudsen, 2011b), then in the ADR organization online database provided by the EC only **8.3%** of ADR organizations provided their contact information and information regarding their procedures in English. Additionally, the empirical research indicated that only 15% of ADR organizations responded to cross-border consumer request for information and the majority of organizations responded only after receiving reminder.³⁷ So it is important that ADR organizations provide the necessary information in English and keep it up to date as well as are able to respond quickly to questions received from cross-border consumers in English.

For consumers, it is also important that the procedure is simple and clear and does not require additional costs for hiring a professional representative or a text translation. (Kramer, 2008, 12) Therefore, when developing consumer cross-border dispute resolution procedure, it is necessary to determine that all the necessary elements of ADR procedure can be made online, thus working on online dispute resolution principles.

³⁷ Only 15% of all ADR organizations in the EU responded to the author's information request regarding their experience in solving cross-border complaints.

Overall, the developed guidelines for the establishment of a cross-border ADR organization incorporate and represent working principles that have been acknowledged as best practice by different researches.

Conclusion

In order to achieve maximum performance of ADR organizations when resolving consumer cross-border disputes, it would be desirable that all ADR organizations are established or reorganized similarly incorporating the above mentioned guidelines. However recent EC attempts to ensure that ADR procedures would comply with consistent quality requirements that apply throughout the EU by adapting the new ADR directive has failed. Although the new ADR directive proposes some unified requirements, overall ADR organizations can be established or reorganized however they desire without providing similar working principles. Therefore it has become the responsibility of national governments and ADR organizations to ensure establishment of consistent quality ADR organizations based on similar working principles.

However, when developing new or reorganizing existing ADR organizations, one has to take into account the interests of the consumer in order to enhance consumer participation in the ADR procedures and defend their rights. At the same time for better results various organizational factors have to be considered, that could ensure smooth functioning of the ADR organizations, by taking into account the recommendations developed by the EC without reducing the examination quality of the complaints. Successful accomplishment of all the preconditions would help to establish high performance consumer cross-border ADR organizations that could provide fast, easy and cheap consumer cross-border dispute resolution which would finally meet the EC promoted ideas. The above developed guidelines could serve as an inspiration in this process.

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