



# **BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances**

**REVISED PEER REVIEW DOCUMENTS**

**April 2021**

OECD/G20 Base Erosion and Profit Shifting Project

# **BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances**

Revised Peer Review Documents

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# Introduction

This report presents the revised peer review documents for the review of the implementation of the BEPS Action 6 minimum standard on treaty shopping. The original peer review documents were approved by Working Party no. 1 on Tax Conventions and Related Questions (WP1) under written procedure on 11 March 2017, and by the Inclusive Framework on BEPS (IF) on 24 April 2017 (the 2017 Peer Review Documents). The new documents reflect changes agreed by WP1 in January 2021.

Changes agreed by WP1 to the carrying out of the peer review of the implementation of the Action 6 minimum standard on treaty shopping are integrated in the 2017 Peer Review Documents. Making these changes is a response to the statement in paragraph 14 of the 2017 Peer Review Documents that a review of the methodology would take place in 2020.<sup>1</sup>

Changes are made in different sections of the 2017 Peer Review Documents to establish a framework through which assistance would be given to an IF jurisdiction that had non-compliant agreements with members of the IF that could, on its own assessment, create treaty-shopping opportunities and for which the jurisdiction had not yet taken steps to bring them into compliance with the minimum standard. The assistance would include a recommendation to formulate a plan if one was not already in existence. A jurisdiction that is using the MLI to implement the minimum standard would be recommended to complete the steps to have it take effect with respect to its agreements.

The Secretariat would not be asking jurisdictions for confidential information about specific treaty negotiations, nor would jurisdictions be obliged to supply confidential information in their replies to the questionnaire. As in previous years, the Inclusive Framework would decide how much information to make public.

The changes to the 2017 Peer Review Documents are also made to:

- align the terminology of the 2017 Peer Review Documents with that used in the peer review questionnaires sent to IF members for the 2018, 2019 and 2020 peer reviews (jurisdictional sections, compliant agreements, agreements subject to a complying instrument, etc.);
- include relevant information on the peer review reports approved and published in 2019 and 2020 and to the changes to the 2017 Peer Review Documents; and
- make relevant references to the MLI and the 2017 OECD Model Tax Convention (that had not been approved at the time the 2017 Peer Review Documents were first discussed).

Following approval by the IF of the revisions to the 2017 Peer Review Documents suggested in this report, the revised peer review process would be used to carry out the Action 6 peer review process beginning in 2021 and the revised Peer Review Document would be made available to the public.

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<sup>1</sup> Para. 14, OECD (2017), *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, [www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf).

# Revised Peer Review Documents

## Summary

1. The Action Plan on Base Erosion and Profit Shifting (“BEPS Action Plan”) identified 15 actions to address BEPS in a comprehensive manner. In October 2015, the G20 Finance Ministers endorsed the BEPS Package, which includes the report on Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (“the Final Report on Action 6” or “the Report”, OECD (2015)).
2. The minimum standard on treaty shopping included in the Report on Action 6 is one of the four BEPS minimum standards. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. All members of the Inclusive Framework on BEPS are committed to implementing the Action 6 minimum standard and to participating in the peer review on an equal footing.
3. All jurisdictions that were members of the Inclusive Framework on BEPS participated in the first peer review processes on the implementation of the Action 6 minimum standard that took place in 2018, 2019 and 2020. Those peer review processes were carried out following an agreed approach that was set out in a document published on 29 May 2017, and that formed the basis on which the peer review process was undertaken ([the 2017 Peer Review Documents](#)).<sup>2</sup> The 2017 Peer Review Documents included the Terms of Reference which set out the criteria for assessing the implementation of the Action 6 minimum standard, and the methodology which sets out the procedural mechanism by which the review will be conducted.
4. The Inclusive Framework on BEPS published reports for each of the three peer review processes carried out.<sup>3</sup>
5. Paragraph 14 of the 2017 Peer Review Documents provided that the methodology for the review of the implementation of the minimum standard on treaty shopping would be reviewed in 2020 in light of the experience in conducting that review. In 2021, members of the Inclusive Framework on BEPS approved this 2021 Peer Review Document which is an updated version of the 2017 Peer Review Documents. The changes to the Peer Review Documents relate to the methodology; changes to other sections of the Peer

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<sup>2</sup> OECD (2017), *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. [www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf).

<sup>3</sup> OECD (2019), *Prevention of Treaty Abuse - Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <https://doi.org/10.1787/9789264312388-en>; OECD (2020), *Prevention of Treaty Abuse – Second Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/d656738d-en>.

Review Documents are mostly conforming in nature. The Action 6 minimum standard and the way it is reflected in the Terms of Reference is unchanged.

6. This 2021 Peer Review Document will govern the conduct of future peer reviews of the Action 6 minimum standard. It describes: the core output of the peer review and monitoring process; the process for the resolution of interpretation and application issues that might arise in the course of implementing the minimum standard on treaty-shopping; the process to be followed by jurisdictions that encounter difficulties in getting agreement from another jurisdiction member of the Inclusive Framework on BEPS in order to implement the Action 6 minimum standard; and the confidentiality of documents produced in the review process.

## The proposed process for the review of the implementation of the minimum standard on Action 6

7. Paragraph 23 of the Final Report on Action 6 noted that the inclusion of the minimum standard on treaty-shopping in the [Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](#) (MLI) provides an effective way to quickly implement that minimum standard. Members of the Inclusive Framework on BEPS are therefore encouraged to use the MLI for that purpose. Review of bilateral treaties and protocols are needed, however, for jurisdictions that will not sign the MLI or that disagree as to how the minimum standard should be met through the provisions of that instrument.

## Terms of Reference

8. The minimum standard on treaty shopping included in the Report on Action 6 is constituted by the provisions that jurisdictions that are members of the Inclusive Framework on BEPS have committed to include in their tax treaties. Concretely (see paragraphs 22 and 23 of the Final Report on Action 6), compliance with the minimum standard on treaty shopping will therefore require these jurisdictions to include in their tax treaties:

- A. An express statement, found in the preamble text of the 2017 OECD Model Tax Convention and in Article 6(1) of the MLI, that the common intention of the parties to the treaty is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. This should generally be done by including the following in the preamble of the relevant tax treaties:

*Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)*

- B. Treaty provisions that will implement that common intention and that will take one of the following three forms:
- i. the Principal Purpose Test (PPT) rule included in paragraph 26 of the Report together with either the simplified or the detailed version of the Limitation-on-benefits (LOB) rule that appears in paragraph 25 of the Report, as subsequently modified, or
  - ii. the PPT rule included in paragraph 26 of the Report, or
  - iii. the detailed version of the LOB rule that appears in paragraph 25 of the Report, as subsequently modified together with a mechanism (such as a treaty rule that might take the form of a PPT rule restricted to conduit arrangements, or domestic anti-abuse rules

or judicial doctrines that would achieve a similar result) that would deal with conduit arrangements not already dealt with in tax treaties.

9. The PPT is found in Article 29(9) of the 2017 OECD Model Tax Convention and in Article 7(1) of the MLI. The LOB is in Article 29(1-7) of the 2017 OECD Model Tax Convention and the simplified LOB in Article 7(8-13) of the MLI.

10. Paragraph 23 of the Final Report on Action 6, which presents the obligation to implement the minimum standard, reads as follows:

*“Countries commit to adopt in their bilateral treaties measures that implement the minimum standard described in the preceding paragraph if requested to do so by other countries that have made the same commitment and that will request the inclusion of these measures. Whilst the way in which this minimum standard will be implemented in each bilateral treaty will need to be agreed to between the Contracting States, this commitment applies to existing and future treaties. Since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, however, this commitment should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time. Also, if a country is not itself concerned by the effect of treaty-shopping on its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose. Whilst the minimum standard will be included in the multilateral instrument that will be negotiated pursuant to Action 15 of the BEPS Action Plan, which will provide an effective way to implement it swiftly, this may not be sufficient to ensure its implementation since participation in the multilateral instrument is not mandatory and two countries that are parties to an existing treaty may have different preferences as to how the minimum standard should be met; monitoring of the implementation of the minimum standard will therefore be necessary.”*

11. It is understood from paragraph 23 of the Final Report on Action 6 that:

- Jurisdictions only need to satisfy the requirements described in the previous paragraph if requested to do so by another jurisdiction member of the Inclusive Framework on BEPS.
- The way in which the minimum standard will be implemented in each bilateral treaty will need to be agreed to between the contracting jurisdictions.
- This commitment applies to existing and future treaties but since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, this commitment should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time.
- If a jurisdiction is not itself concerned by the effect of treaty shopping on its own taxation rights as a jurisdiction of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose.

12. It is also understood from paragraph 23 of the Final Report on Action 6 that, while the MLI provides an effective way for jurisdictions that choose to apply the PPT to implement the minimum standard swiftly, participation in the MLI is not mandatory and jurisdictions may have different preferences as to how the minimum standard should be met. However, jurisdictions that have signed the MLI are expected to take steps to ensure that it starts to take effect with respect to their Covered Tax Agreements. Where two parties to a tax treaty have signed the MLI but only one has listed the tax treaty, listing the tax treaty amounts to a request to implement the minimum standard.

## Output of the peer review and monitoring process

13. The core output of the peer monitoring process will come in the form of an annual report on the implementation of the minimum standard on treaty shopping. WP1 will aim to present this report to the

Inclusive Framework on BEPS at its first meeting of the following year. The report deals with compliance with the minimum standard by each jurisdiction member of the Inclusive Framework on BEPS and includes jurisdictional sections for each member of the Inclusive Framework on BEPS. These sections contain detailed information on jurisdictions' progress towards the implementation of the minimum standard.

14. That report and the jurisdictional sections reflect whether and how the minimum standard has been incorporated in all the existing bilateral treaties of each jurisdiction of the Inclusive Framework. Since each jurisdiction of the Inclusive Framework reports on all its tax treaties in force, including those with jurisdictions that are not Inclusive Framework members, there is no need to request jurisdictions of relevance that are not part of the Inclusive Framework to provide similar information. The report and jurisdictional sections also describe any implementation issues on which guidance or support is requested and any case where WP1 considers that a jurisdiction is unwilling to respect its commitment to implement the minimum standard on treaty shopping.

15. The Inclusive Framework on BEPS is invited to approve each such report and decide which part of it should be published. In order to avoid a situation where a jurisdiction would systematically block the approval or publication of a report because of what it says about that jurisdiction, the “consensus minus one” standard currently used for the adoption of reports by the Global Forum on Transparency and Exchange of Information (GFTEoI) would be used with respect to each section of a report that deals with a specific jurisdiction.

## Methodology

16. The review of implementation of the minimum standard on treaty shopping is carried out by WP1 and all jurisdictions that are members of the Inclusive Framework on BEPS participate in that work on an equal footing. The process began in 2018 and, since then, three reports on the implementation of the minimum standard were adopted by the Inclusive Framework on BEPS.<sup>4</sup> The peer review process that led to the development of those reports was carried out following an agreed approach that was set out in a document published on 29 May 2017, and that formed the basis on which the peer review process was undertaken (the 2017 Peer Review documents).<sup>5</sup>

17. In 2021, and in accordance with paragraph 14 of the 2017 Peer Review Documents, the Inclusive Framework on BEPS approved this 2021 Peer Review Document which includes changes to different sections of the 2017 Peer Review Documents.

18. The first step of the revised peer review process is carried out through a peer review questionnaire that each jurisdiction of the Inclusive Framework is asked to complete before 31 May,<sup>6</sup> and that shows all the existing comprehensive tax treaties on income taxes of that jurisdiction that are in force at that time.

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<sup>4</sup> OECD (2019), *Prevention of Treaty Abuse - Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <https://doi.org/10.1787/9789264312388-en>; OECD (2020), *Prevention of Treaty Abuse – Second Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/d656738d-en>.

<sup>5</sup> OECD (2017), *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, [www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf).

<sup>6</sup> That “cut-off” date is suggested in order to leave [sufficient](#) time to complete the subsequent steps leading to the presentation of a report to the Inclusive Framework on BEPS in January.

For each tax treaty listed, members indicate whether or not it complies with the minimum standard described in the terms of reference at paragraph 2 above. A tax treaty complies with the minimum standard if it does so as originally signed, if an amending instrument that implements the minimum standard in that tax treaty is in force, or if the relevant provisions of the MLI have started to take effect for that tax treaty (in accordance with Article 35 of the MLI).

19. For each tax treaty listed that is non-compliant with the minimum standard, members indicate whether it is on course to become compliant with the minimum standard (i.e. whether it is subject to a complying instrument). This is satisfied if a member has signed the MLI and both jurisdictions have listed the treaty as one to be covered. It is also satisfied if an amending bilateral tax treaty implementing the minimum standard in the treaty has been signed or if a completely new treaty that complies with the Action 6 minimum standard and that would replace that treaty has been signed.

20. A member that is implementing the minimum standard by signing the MLI will be recommended to complete the steps to have it take effect with respect to its tax treaties.

21. Members will provide additional information for tax treaties that are not compliant and not subject to a complying instrument:

- *Plan to implement a detailed LOB provision:* If a member intends to use the detailed LOB as part of its commitment to implement the minimum standard in all of its bilateral tax treaties, the additional information to be provided is a general statement that it intends to implement the minimum standard bilaterally by negotiating a detailed LOB provision and that the negotiation of its agreements will take place as time and resources permit. The detailed LOB provision is not included in the MLI and requires substantive bilateral discussion and customisation to each tax treaty, which could take several years. The general statement that the jurisdiction would provide, within its own peer review questionnaire, would not need to be repeated for each of the relevant tax treaties. If a jurisdiction makes such a statement, its treaty partners will not generally provide any additional information about their tax treaty with that jurisdiction.
- *Steps taken to enable the tax treaty to become subject to a complying instrument:* A member that does not intend to use the detailed LOB as part of its commitment to implement the minimum standard in all of its bilateral tax treaties to implement the minimum standard will provide information on the steps it has taken to implement the minimum standard for each tax treaty not compliant with the minimum standard or not subject to a complying instrument. This is satisfied if a member has signed the MLI and listed the tax treaty under the MLI, even if its partner jurisdiction has not done so. It is also satisfied if a member has entered into bilateral renegotiations with a treaty partner, agreed to enter into such renegotiations, or contacted its treaty partner with a draft protocol to implement the minimum standard.
- *Other tax treaties:* With respect to tax treaties not dealt with above and concluded with other members of the Inclusive Framework, a member will provide reasons why, for that member, the tax treaty does not give rise to material treaty-shopping concerns. Where, for a tax treaty, a jurisdiction does not provide such information, it will formulate a plan to include the minimum standard in that tax treaty.

22. As part of the peer review process:

- the Secretariat will contact the jurisdictions that have tax treaties for which a plan for the implementation of the minimum standard needs to be developed;
- if a jurisdiction wants to implement the minimum standard through the PPT and some or all of its treaty partners are already signatories to the MLI, the Secretariat will provide support and encourage the jurisdiction to sign and ratify the MLI; and

- for tax treaties that will not become covered tax agreements under the MLI or that are not covered by a general statement on the negotiation of detailed LOB provisions, the Secretariat will encourage the treaty partners to develop a plan, and where possible a joint plan, for the implementation of the minimum standard.

23. The information to be included in the plan is the way in which the minimum standard will be implemented – for example, that the jurisdictions will:

- include the tax treaties in their list of covered tax agreements under the MLI;
- enter into bilateral negotiations for the implementation of the minimum standard; or
- sign and ratify the MLI and list the tax treaties as a covered tax agreements.

24. If the jurisdictions do not make a plan (or provide an update on the plan) to implement the minimum standard in advance of WP1's discussion of the draft peer review report, a recommendation to provide a plan will be included in the peer review report with respect to the tax treaty.

25. Once a plan is in place, the jurisdiction will provide an annual update if changes occur. The jurisdiction that is facing any difficulty in implementing the plan will be able to report such difficulty to the Secretariat.

26. The Secretariat will compile and analyse the responses to the peer review questionnaires prepared by all jurisdictions in order to reconcile divergent information that could be provided by the parties to the same treaty and in order to verify that treaties that are described as complying with the terms of reference actually do so.

27. WP1 will meet to review and discuss a first draft peer review report, together with the Secretariat comments, in order to address any difficulties and discrepancies.

28. A revised peer review report that will reflect the discussion and views expressed by WP1 at its meeting will be prepared and will be sent to WP1 delegates as soon as possible thereafter. That report, which will also include aggregate statistical data based on the responses to the peer review questionnaire and issues discussed by the Working Party 1 that remain unresolved, will be revised through written procedure in order to be finalised before the end of December and forwarded to the Inclusive Framework as part of the annual peer review report on the implementation of the minimum standard on treaty shopping.

29. The reviews will take place annually in accordance with the steps above.

30. The methodology for carrying out these steps will be reviewed as necessary, with the expectation that the next review would be carried out in 2026.

### **Interpretation and application issues that might arise in the course of implementing the minimum standard on treaty shopping**

31. As already indicated, paragraph 23 of the Final Report on Action 6 already addresses some implementation issues related to the minimum standard on treaty-shopping. It is possible, however, that additional issues will arise in the course of the implementation of the minimum standard between jurisdictions that are members of the Inclusive Framework. Any jurisdiction that wishes to raise an issue related to the implementation of the minimum standard that was not previously addressed by the CFA or the Inclusive Framework on BEPS will be able to do so by informing the Secretariat, which will ensure that the issue is discussed at the subsequent meeting of WP1. These issues and the responses provided by the Working Party will be notified and reviewed by the Inclusive Framework on BEPS as part of its discussion of the annual report on the implementation of the minimum standard on treaty shopping that

will be produced by WP1. In order to be submitted in such a report, the issue should be brought to the attention of the Secretariat before the WP1 meeting that discusses the draft peer review report.

### **Jurisdictions that encounter difficulties in getting agreement from another jurisdiction member of the Inclusive Framework on BEPS in order to implement the minimum standard on Action 6**

32. Since the application of the minimum standard to an existing bilateral treaty would involve two jurisdictions, it would be possible to envisage a process through which any jurisdiction that would face difficulties in getting agreement from another jurisdiction to amend an existing treaty in order to implement the minimum standard could raise the matter with a monitoring body that would include representatives of the jurisdictions that committed to the implementation of the minimum standard.

33. It is important, however, to distinguish cases where jurisdictions do not agree to modify a treaty in order to implement the minimum standard from cases where

- a) a jurisdiction does not agree on the anti-treaty shopping provision to be included in a treaty (i.e. detailed LOB and anti-conduit mechanism, PPT only or LOB plus PPT);
- b) a jurisdiction does not agree to enter into a new treaty with a jurisdiction, or
- c) a jurisdiction agrees to amend an existing treaty to incorporate the minimum standard but is unable to ensure a quick conclusion and ratification of the necessary protocol.

34. As indicated in paragraph 23 of the Report on Action 6 “since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, however, this commitment [*i.e. to implement the minimum standard*] should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time.” The paragraph also provides that “two countries that are parties to an existing treaty may have different preferences as to how the minimum standard should be met”. For these reasons, a case that corresponds to situation a), b) or c) above will not be considered to be a case where a jurisdiction does not agree to modify a treaty in order to implement the minimum standard.

35. Subject to that caveat, it is proposed that any jurisdiction member of the Inclusive Framework on BEPS that is facing difficulties in getting another jurisdiction to agree to amend an existing treaty in order to implement the minimum standard on treaty shopping will be able to raise that issue with the Secretariat, which will ensure that the other jurisdiction is offered the opportunity to present its views and that the case is discussed at the subsequent meeting of WP1.

36. Any such case where WP1 considers that a jurisdiction is indeed unwilling to respect its commitment to implement the minimum standard on treaty shopping will be forwarded to the Inclusive Framework on BEPS as part of the annual report on the implementation of the minimum standard on treaty shopping that will be produced by WP1. In order to be included in such a report, the issue should be brought to the attention of the Secretariat before the WP1 meeting that discusses the draft peer review report.

### **Confidentiality**

37. No part of any report or other document produced in the context of the review process for the implementation of the minimum standard on treaty shopping should be made publicly available in any form or manner prior to its publication or before the Inclusive Framework on BEPS indicates that such document should not be treated as confidential. Any breach of confidentiality shall be brought to the attention of the Inclusive Framework on BEPS for a decision on the most appropriate action to take.

# References

OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241695-en>.

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