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Governing "Better Regulation" in Europe: The Logic, Limits of and Prospects for a "Middle-aged" Reform Policy

Kai Wegrich*

Introduction: the rise of the "better regulation" agenda[1]

Governments worldwide are confronted with increasing demands to improve the quality of their regulatory activities. Such demands are expressed by a variety of actors: business associations complain about regulatory costs and bureaucratic burdens associated with complying with government regulation; consumer and user groups demand tight regulation of market players in areas such as food safety, public transport, energy and, of course, the financial market. Even public services such as schools, hospitals and universities are increasingly held accountable to deliver results measured against explicit standards of performance. Scholars of regulation can hardly be surprised by such demands, since they have long diagnosed the move towards regulation as an increasingly important public policy tool, given the exhaustion of spending and public provision as alternative modes of governance (Majone 1994). The recent global financial crisis will reinforce this trend, given the depletion of governments' resources after bank bailouts and the proliferation of economic stimulus packages.

In other words, regulation is here to stay, and therefore the issue of high quality regulation is ever more important. While the quality of regulation is not at all a new issue, the development of a comprehensive better regulation agenda as a specific activity of governmental reforms is of relatively new origin, though it is slowly maturing and approaching "middle age". For the first time, in 1995, the OECD defined guidelines for regulatory reform and established "better regulation" as a field for "whole-of-government" reform. According to these guidelines, a range of instruments from the better regulation toolbox should be made mandatory and governance structures should be institutionalised in order to embed better regulation as a key concern in everyday regulatory activities of ministries and regulatory agencies. Since the early 2000s, a transnational community of practice has emerged in Europe, which consists of governmental officials, in particular from better regulation units situated in core executive departments (finance ministries, head of government offices), think tanks and foundations supporting the cause of better regulation, like the Bertelsmann Foundation in Germany. This international community is a key driver for the rapid diffusion of better regulation tools – such as Regulatory Impact Assessment (RIA) or cost measurement tools, such as the Standard Cost Model (SCM; to be explored below) – across European countries and the wider OECD world over the past decade (Wegrich 2009a).

Today, almost all OECD countries claim to have adopted a better regulation policy and established mandatory procedures for improving regulation such as RIA or consultation procedures (OECD 2009, 99–101). However, even after 10 to 15 years of experience, the success of these reforms is not yet evident. Complaints about regulatory quality are as loudly voiced today as ever. Proclamations about the success of better regulation activities – such as the reduction of administrative burden for business (by 25 percent in the Netherlands by 2007, similar reductions are projected for 2010 and 2011 in the UK and Germany) – are not reflected in similar levels of enthusiasm among the targeted stakeholders. This paper argues that the challenge of better regulation policies to deliver their promise of improving the quality of government regulation rests on two related aspects. First, the ambition of better regulation to improve the regulation of governmental systems (rather than in individual regulatory fields) leads to a complex governance logic that requires carefully

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[1] This article builds on Wegrich (2009b) and Lodge and Wegrich (2009).

crafted institutional reforms in order to become effective. Second, objectives of "better regulation" are shaped by different and contested understandings of what good regulation really is; compromises between these different understandings of good regulation have so far led to some groups' disappointment and frequent agenda change in some countries, limiting policy coherence. This paper will explore how different European governments – including Germany, the Netherlands, the UK and the EU Commission – cope with these two challenges. This comparison will show that all governments follow increasingly "smart" approaches in dealing with the challenges posed by the complexity of the better regulation governance logic, but struggle with the challenge related to contested understandings of good regulation.

What is "better regulation"? Objectives and instruments

The core assumption of the better regulation agenda is that governments systematically produce regulation of poorer quality than is desirable and feasible. This deficiency is systemic because regulatory failures are not the result of human error, but result from inherent traits in the regulatory system. Institutional change is needed to enhance the capacity of governments to produce high-quality regulations (for the OECD definition of high quality regulation, see OECD 2005, 3). However, different advocacy groups contest what the key cause and symptom of regulatory failure is. The following three perspectives are among the most audible in the debate on better regulation (OECD 2005; Lodge and Wegrich 2009; Radaelli and Meuwese 2009; Radaelli 2010):

- One of the loudest voices in the better regulation debate sees the key problem to be bureaucratic regulation. According to this view, the dominance of bureaucratic actors and views leads to a detachment of regulatory design from the needs of the regulatees, i.e., businesses. It is particularly problematic that different individual regulations, imposed by a plethora of regulators, add up to a grid of regulations which cumulatively have a major impact on business organisations, i.e., by imposing high compliance costs and limiting their flexibility. In general, regulations are regarded as being more problematic than beneficial, and should be kept to a minimum. If not avoidable, regulation should rely on alternatives to classic command-and-control approaches (government prescribing standards that are enforced by state authorities and backed by sanctions), and instead rely on market-type instruments (i.e. emissions trading) and self-regulatory systems. From this perspective, better regulation is about reducing the existing stock of regulation, avoiding new excess regulation and reducing compliance costs for businesses. Among the favourite instruments are sunset clauses (expiry dates) for new regulations and compliance cost exercises, such as the Standard Cost Model.
- A second perspective of importance in the better regulation debate sees the politicisation and lack of planning in regulatory design and enforcement as the major problem that leads to low-quality regulation. Regulations adopted in response to public and media pressure (i.e., in the aftermath of scandals and crises) are developed under high time pressures and with a lack of sound evidence regarding the costs and benefits of the regulation under consideration. Such a lack of evidence-based regulation can lead to arbitrary agenda development and overregulation in some areas, and too few regulations in others. Accordingly, "better regulation" is about creating procedural and organisational devices that channel demands for regulation and allow for a cool-headed view of problems and probabilities, in particular by strengthening the analytical (if not scientific) component in regulatory design and application. While defining objectives is still regarded as the responsibility of politicians, the selection of regulatory tools should be based on a mandatory and controlled process of gathering and analysing evidence of the costs, benefits and potential side effects of regulation. Primary tools include Regulatory Impact Assessment on the regulatory design level, and Risk-Based Regulation at the enforcement stage.
- A third perspective sees the Achilles' heel of regulation in the capture of the regulatory process by the regulated industry. Building on economic power and established networks with the political-administrative institutions in that domain, the regulated industry (or sector more widely) is able to shape regulatory choices according to its interests. Regulatory capture can lead to too much regulation (i.e., restricting market entry), as well as too little regulation (i.e., limiting social regulation such as consumer protection standards). The preferred tools of better regulation are all those that (seek to) create a level playing field for all societal actors in the regulatory process, i.e., through consultation procedures and freedom of information rules.

Given these contrasting understandings of regulatory failure, the solution of the better regulation agenda is not (primarily) to proliferate a specific set of substantial regulatory objectives. Instead, the core idea is to enhance the capacity of governments to systematically produce high-quality regulations by embedding a range of procedural requirements and analytical methods as part of routine policy making (Radaelli and Meuwese 2009). These procedural requirements aim at using analysis and evidence in regulatory design in order to choose the least intrusive and most cost-effective regulatory approach to address any regulatory issue. Such procedural standards can address various stages of the regulatory process, from the input provided by societal actors, to the design of regulatory standards, to the implementation or enforcement of these standards, and finally, to their evaluation (Wegrich 2009b, 37–40). For example, consultation procedures are related to the input stage, while instruments of risk-based regulation address the implementation/enforcement stage. Regulatory Impact Assessment (RIA) systems are often regarded as the key instrument for "better regulation" and are seen as the nucleus from which further elements of a comprehensive and sustainably better regulation strategy can be developed. A range of subsidiary better regulation instruments – such as consultation procedures, various forms of (regulatory) cost assessment exercises, as well as cost-benefit analyses – are attached to the framework provided by the Impact Assessment system. RIA systems in particular, and better regulation tools in general, rely on a specific governance logic in order to shape regulatory design, choice and enforcement. The following section outlines this specific governance logic (focussing on Regulatory Impact Assessment in particular) and shows how four European governments (including the EU Commission) have dealt with the challenges associated with that policy model.[2]

Regulatory governance: towards "smarter" forms of control

The essence of Impact Assessment systems lies in their combination of analytical methods with procedural standards. The core problem of any attempt to further "better regulation" is the lack of natural support that policy departments provide in backing crosscutting regulatory policies, especially when these emerge in the form of extensive procedural rules that effect the autonomy of departmental policy making. If the assessment criteria that structure Impact Assessments are not part of the set of criteria usually relevant for a specific unit of government, taking these systematically into account will not be the first priority of the policy bureaucrats in that unit (think of the relevance of a compliance cost assessment for a ministry of the environment). By defining analytical methods as procedural standards, the usage of these methods can be standardised and controlled from the position of an organisation or unit that is separated from the regulatory institution itself. This is needed to avoid patchy and episodic, rather than systematic, usage of the analytical tools prescribed by RIA rules. In other words, RIA systems and other better regulation tools require and facilitate the development of internal governance structures to monitor and enforce compliance with procedural standards.

To address this challenge, the OECD (2005, 3) advises that sustained commitment from the top is required, which involves an adequately staffed unit for "better regulation" at the centre of government (i.e., the prime minister's/president's office or finance ministry). Debates regarding the location of dedicated better regulation units have been prominent in all four governments under discussion here (see Table 1 for an overview). In the United Kingdom, the initial deregulation unit moved from the then Department of Trade and Industry to the cabinet office, where it went through various incarnations (Baldwin 2005). It has since moved back to the renamed Department of Trade and Industry, now the Department for Business, Innovation and Skills. External commissions (such as the Better Regulation Task Force and later the Better Regulation Commission) have been set up to review regulatory approaches and offer advice to government on the further development of the better regulation agenda.

The Netherlands has a similarly long history of commissions and units established in various departments, with the justice ministry being the first host institution and the Ministry of Economic Affairs getting involved in the mid-1990s. The latter ministry also played host to an inter-ministerial unit for administrative burden on business (IPAL), but the unit was shifted to the finance ministry in 2003, where it

[2] See Wegrich (2009b), Lodge and Wegrich (2009) for more detailed references. The reports on the (ongoing) OECD review of regulatory reform in the EU-15 counties provide a detailed overview of better regulation policies also on the countries selected here (see http://www.oecd.org/document/24/0,3343,en_2649_34141_41909720_1_1_1_1,00.html). On the EU Commission see: http://ec.europa.eu/governance/better_regulation/index_en.htm.

Table 1

Governance of "better regulation"

	EU Commission	Germany	Netherlands	UK
Governance structure	Fragmented responsibility recently concentrated at Secretariat General and DG Enterprise, with the former responsible for RIA and the latter SCM and deregulation. Lack of coordination, oversight and control recently addressed with the establishment of Impact Assessment Board, increase in DG Enterprise staff and the creation of external stakeholder group dealing with administrative simplification.	Until 2006: Fragmented responsibility of line ministries (economics, interior) with few staff. Establishment of better regulation unit in the chancellery (12 staff) and the external advisory body (*Normenkontrollrat)* regulatory control council) with rights of intervention into the drafting of laws; secretariat in the chancellor's office.	Until 2007: Responsibility for policy coordination mainly situated in the finance ministry. 2007: Formation of combined department, the Regulatory Reform Group, responsible for implementing reforms on behalf of the state secretaries for finance and economic affairs. 2000: ACTAL established in 2000 as an independent watchdog monitoring departmental measurement of administrative costs of laws.	Various units attached to the cabinet office since 1980s (Deregulation Unit, Regulatory Impact Unit, Better Regulation Unit); growth of the unit (up to 90 staff) under Labour. Advisory unit with business experts (better regulation task force) terminated in 2007. 2008: Better Regulation Unit shifted to new Department for Business, Industry and Skills 2009: Establishment of the Regulatory Policy Committee (in 2009) as an independent advisory body modelled after ACTAL.
Modes of Control	(Semi) public naming & shaming combined with hierarchical quality check for IA.	Combination of hierarchy, cooperation and naming & shaming in the control system exercised by the *Normenkontrollrat.*	Combination of hierarchy, cooperation and naming & shaming in the control system exercised by ACTAL.	External evaluation of quality of RIA by the National Audit Office; internal control of formal compliance, limited quality control.

Source: Own compilation.

increased its influence and reputation (beyond the Dutch borders). IPAL became the Regulatory Reform Group (RRG) in 2007 and was merged with other units from the economics department. But, the Netherlands is mainly known for the institutionalisation of an independent monitoring unit (ACTAL) that is not part of the governmental hierarchy, but has the right to participate in the law-making process by providing opinions on the quality of departmental cost assessment exercises. In Germany, responsibility for regulatory quality has traditionally been distributed across ministries, mainly the Federal Ministry of the Interior and the economics ministry, but also the justice ministry. In 2006, a better regulation unit was established in the chancellor's office, which also hosts the independent national Normenkontrollrat – a watchdog, modelled on the Dutch example, tasked to check ex ante departmental measurements of administrative costs and to advise government on better lawmaking. At the EU level, the DG Enterprise has established itself as the main administrative backbone of a range of better regulation initiatives. The Secretariat General is responsible for the Impact Assessment system and the supervision of DGs' compliance (supported by the Impact Assessment Board, attached to the Secretariat General). The strengthening of administrative and advisory capacities in the Commission has addressed the long-standing lack of administrative resources to monitor and support compliance by DGs (Radaelli and Meuwese 2010).

Location and support from the top are not everything, however. Agendas and concerns of politicians at the top change, and "better regulation" can hardly be expected to remain a personal priority of leading government politicians over a longer time period. More important is the way such a unit, wherever located, seeks to persuade other departments and governmental units to follow its agenda. One perspective is to steer via hierarchical means. That is, to rely on the setting of procedural standards, setting targets, monitoring compliance, checking administrative burden reduction plans and instituting administrative sanctions. The UK strongly relies on these mechanisms in enforcing better regulation rules. Such an approach may not only conflict with constitutional conventions (it would be in tension with the constitutional departmental principle as one of the three organising principles for the federal government in Germany); continued oversight is also extremely costly and is likely to have a detrimental

effect on the motivation of policy-making officials in departments.

A different approach is to rely on benchmarking, self-reporting and "naming and shaming". Again, the risk is that the race for high quality regulation will become one of creative benchmark-hitting. A different approach to this rivalry-driven approach to better regulation is to rely on mutual learning. That is, to establish "high quality regulation watchers" in each department and to ensure that they communicate and learn from each other. The high quality agenda, from that perspective, is a process of mutual learning and not a process of intervening into departmental turf by the imposition of external criteria. However, such a process is inherently limited if departmental objectives conflict with those of the cross-cutting better regulation agenda, whether in terms of substantive objectives or in terms of preferred policy style.

In practice, many governments have long relied on a combination of hierarchy and cooperative styles of control – usually in the form of combining process standards with support infrastructure, including so-called satellite units of central better regulation units in departments. More recently, governments are deploying other combinations of control modes in order to overcome their individual downsides. One recent shift is to move to targets as a variation of hierarchical modes of control. Most EU member countries have followed the Dutch model by adopting reduction targets for administrative burden imposed on businesses by government regulation, usually 25 percent.

Another trend in control relations is to link quality assurance processes to mechanisms of (semi) public naming and shaming. For example, the EU Commission's RIA quality control unit, the Impact Assessment Board, publishes its opinions on the quality of the Impact Assessments carried out by the Directorates General (but only after the completion of the law-making process). In the Netherlands and Germany, similar mechanisms of publishing opinions of external watchdogs (here attached to the draft laws) have played a key role in achieving departmental compliance. According to empirical analysis of draft laws from the parliamentary term of 2005 to 2009 in Germany,[3] the compliance with the rules to carry out an ex ante assessment of administrative costs is close to 100 percent (though the quality of the measurements vary). In the UK, such strong ex ante mechanisms are non-existent and hence compliance with and quality of cost measurement exercises are problematic (NAO 2009). But overall, more governments move towards smarter forms of quality assurance and control of better regulation standards.

The politics of "better regulation": compromises and disappointment

Smarter forms of enforcing compliance are critical for any effective better regulation governance strategy and a precondition for the better regulation agenda to have any impact. However, they only provide for the internal condition for effective better regulation strategies. The second precondition is to align different understandings of regulatory failure and related demands for improving the quality of regulations. As discussed above, these understandings do vary substantially, and better regulation policies are based on the relative strength of coalitions advocating their understanding of better regulation. This section compares how the four governments' RIA systems and approaches to administrative burden reduction (using the SCM method) have been shaped by different advocacy groups. Table 2 provides an overview on the design of those two (related) better regulation policy tools.

The design of regulatory Impact Assessment systems in particular has been shaped by a tug-of-war between different advocacy coalitions, in particular between those that regard RIA as an ideal site for de-politicising the regulatory process and strengthening the scientific aspect in regulatory design on the one and those who see RIA as a way to avoid excessive regulation on the other hand. From the first, technocratic, perspective, RIA is about comprehensive cost-benefit analysis regarding economic, social and environmental criteria. The RIA (later IA) system, which has been developed since the early 2000s by the European Commission, follows this broad approach and has the ambition to provide the evidence base for assessing different broad policy packages combining various regulatory and other policy tools. Also, attempts in Germany to establish strong RIA systems in the 1990s and early 2000s (following up on failed attempts in the 1980s) follow this idea of comprehensive tests of costs and benefits of discrete policy options. In the UK, the same understanding of Impact Assessment became dominant in the late

[3] Carried out by the author with Sylvia Veit (Potsdam University), not yet published.

Table 2

Design of RIA system and SCM approach

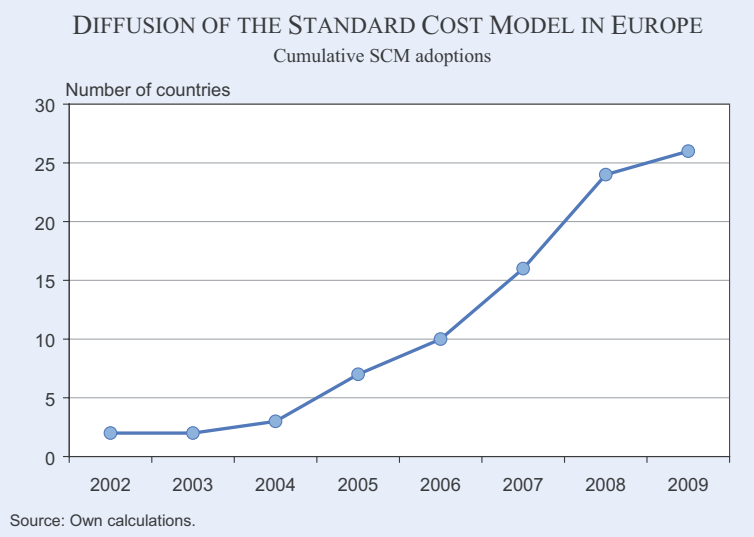
	EU Commission	Germany	Netherlands	UK
RIA	Sector specific impact tests since the 1980s. Multiplication of sectoral IAs since the mid-1990s (environmental impact assessment, competitiveness impact test). Integration into a comprehensive IA system since 2003. Establishment of monitoring and advisory capacity (since 2006), including an Impact Assessment Board composed of external experts, which publishes assessments of quality of IAs.	Early adoption of broad assessment criteria as part of law drafting process (blue test questions) in the mid-1980s. IA procedure regulated in internal governmental rules of procedures (2000), new guidance material published. Low level of departmental compliance due to lack of monitoring or oversight mechanisms. Initiatives to introduce a Sustainability Impact Test as a form of comprehensive RIA.	Limited adoption of broad RIA concepts; various sectoral Impact Assessments with limited central review (Ministry of Economic Affairs); focus of RIA is SCM ex ante assessment.	First initiative to establish compliance cost assessment as predecessor of RIA in the 1980s. Shift to comprehensive impact testing and policy (stages) planning under Labour since 1997.
SCM	Adoption of SCM method in 2006 after initial reluctance concerning the applicability of the model in the EU context. Ex ante assessment of administrative costs, with low compliance in practice. Baseline measurement of 40 pieces of law in 13 priority areas, applying a simplified version of the SCM method (i.e., drawing on results of national measurements).	Comprehensive administrative burden reduction programme adopted in 2006. 25% reduction by 2011. Baseline measurement from 2007–08 (drawing on the Federal Statistics Office). Limited planning of and oversight over simplification measures. Strong oversight of ex ante measurement exercised by newly established *Normenkontrollrat.*	Development of measurement method in the 1990s. SCM method applied comprehensively in 2002. First cycle of meas–urement and reduction completed in 2007. Extension of administrative burden reduction policy to all policy costs (beyond costs induced by information obligations).	Comprehensive administrative burden reduction programme adopted in 2005. 25% reduction by 2010, progress monitoring based on departmental reduction plans. Baseline measurement between Sep. 2005 and May 2006 . Ex ante measurement process established, but limited quality control. Recent shifts towards wider compliance costs and benefits of regulation.

Source: Own compilation.

1990s, when the incoming new Labour government attempted to demarcate itself from the emphasis on deregulation and limiting compliance costs that was the dominant view under Conservative leadership. Following that understanding, RIAs are a tool to control departmental policy making and in particular limit excessive regulation; RIA procedures are more narrowly focussed on assessment of costs coming with regulations, in particular compliance costs for business.

Overall, the technocratic view dominated the development of RIA systems and better regulation policy more widely until the early to mid 2000s, however without fully neglecting the other perspectives. The participatory view on better regulation was reflected in more transparent and open consultancy procedures. The deregulation view was recognised in rules prescribing the testing of alternatives to command-and-control regulations and to systematically consider the "doing nothing" option. But in particular, the 'deregulators' were disappointed by the limited effectiveness of RIA as challenging regulatory growths. The unexpected rise of a Standard Cost Model (SCM) as a new method of measuring regulatory burden was therefore very much welcomed by this sub-community. Drawing on the perceived success of the SCM in the Netherlands, the idea of accounting the administrative (or paper work) costs of complying with regulation was endorsed in the UK in 2005. The UK government invested heavily (mainly in consultancy fees) to catch-up with the Dutch (and Danish) frontrunners and conducted a so-called baseline measurement of all laws as the starting point for reduction exercises within a few months. Since then, the SCM model has quickly diffused across Europe (see Figure 1) and provided tailwinds for those who see RIA as a way to limit excessive regulation, if not to reduce it. Germany jumped on the bandwagon in 2006 and the European Commission started its own initiative around the same time,

Figure



Source: Own calculations.

also recommending to all member states that similar initiatives aiming at reducing administrative burden by 25 percent should be launched.

The SCM model was widely perceived as a solution to the long-standing concern of too much bureaucratic regulation. At the same time, technocrats in countries with weak RIA systems, like Germany, could live with this policy boom, because the SCM method was seen as the first step towards a comprehensive RIA system. However, the SCM has disappointed both advocacy groups. While the reduction of paperwork costs plays too limited a role in the perceived regulatory burden of business to satisfy the deregulators, the technocrats were disappointed by the crowding out of their concerns by the administrative burden reduction policy boom. At the time of writing (early 2010), a new cycle of contestation for dominance in the design of the RIA system can be observed in Germany and the UK. In the UK, the disappointment with the limitations of the SCM has facilitated a renewed interest in the benefits of regulation, as reflected in a report from the Department of Business, Industry and Skills (BIS 2009). In Germany, the debate centres on the future capacity of the *Normenkontrollrat* – and proposals alternate between expanding the measurement of regulatory costs beyond paper work costs (following the Dutch example) and changing its role into a quality control of broader Impact Assessments. While the advocacy coalition supporting comprehensive IA approaches has received tailwind from a political initiative to intruduce a Sustainability Impact Test, the deregulatory view has received additional support from the liberal party in the new governing coalition.

These conflicts and pendulum swings are unlikely to disappear completely in the future, given the existence of competing expectations regarding what "better regulation" should deliver. Rather than solving the tension between different views on good and bad regulation by establishing neutral procedures of better regulation, these procedures become the site of political controversy and contestation – thereby undermining the consistency of better regulation policy.

Conclusion

The comparison of experiences of European governments with better regulation tools shows substantial improvements in controlling the regulatory process. Robust governance structures at the centre of government are in place in three of the four cases the paper looked at (with the frontrunner UK displaying surprisingly fluid structures); and smarter ways of controlling the regulatory process in ministries have been developed over time, in particular with respect to the careful applications of naming and shaming strategies as a way to overcome the limits of hierarchy. However, the four governments have been less successful in managing the in-built tension between different expectations concerning what "better regulation" should deliver. In designing a better regulation programme, governments have to choose between Scylla and Charybdis – an over-inclusive approach that lacks coherence and an approach that is too narrow and only addresses the demands of one particular advocacy group. Given the complexity of the better regulation policy model, policy coherence with a limited focus could provide a more promising road to delivering substantial results than over-inclusive policies.

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