

FOREIGN AFFAIRS (ECONOMIC ACTIVITY OF PUBLIC BODIES) BILL

Memorandum from the Department for Levelling Up, Housing and Communities to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Foreign Affairs (Economic Activity of Public Bodies) Bill ("the Bill"). The Bill was introduced in the House of Commons on 19 June 2023. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The fundamental purpose of the Bill is to prohibit public bodies from imposing boycotts, divestments and sanctions against countries or territories where such measures would be inconsistent with UK foreign policy. The Government believes that public bodies should not be pursuing their own foreign policy, and there should be one coherent policy across the whole of government. The Bill will ensure that the UK speaks with one voice internationally. It will also prevent divisive behaviour that undermines community cohesion.
3. The Bill is UK wide and will apply to public authorities in England, Wales, Scotland and Northern Ireland in accordance with the 'public authorities' definition in section 6 Human Rights Act (HRA) 1998, except where a public authority has been expressly excluded from the Bill.
4. The 2019 Conservative Manifesto included the following statement: "We will ban public bodies from imposing their own direct or indirect boycotts, divestment or sanctions campaigns against foreign countries. These undermine community cohesion." The Manifesto commitment arose in response to the Boycotts, Divestment and Sanctions ("BDS") movement which, in the Government's view, rather than promoting cohesion, debate and dialogue has led to a rise in antisemitism and alienation. As such, the Bill will ban the official boycotts and divestments of public authorities where it would not be in line with UK Government policy. It is intended that the measures will be widely construed, but in short, the main targets of the Bill are:
 - a) Official boycotts: public authorities refusing to contract with suppliers on the basis that they are from certain countries, territories or are affiliated with certain countries or territories; and
 - b) Official divestments: public authorities refusing to invest in or remove investment from certain countries, territories, organisations or groups based on nationality or affiliation with certain countries.
5. As it would be difficult to define the precise limits of "boycotts" or "divestments", and in order to prevent more subtle forms of targeting, the Bill is cast in terms of preventing regard to territory-specific considerations if political or moral disapproval of overseas public authorities would be signalled as a result

C. DELEGATED POWERS

6. There are nine delegated powers in the Bill including the standard power to commence by regulations (clause 17(4)). There is a power for:
- a) the Secretary of State or Minister of the Cabinet Office to amend the Schedule on exceptions for certain bodies and functions and for certain types of consideration to (i) add a description of decisions on exceptions for certain bodies and functions, (ii) add description for certain types of consideration, and (iii) amend or remove a description of decision or consideration (clause 3(2)).
 - b) the Secretary of State or Minister of the Cabinet Office to disapply the Bill in respect of a particular country or territory (clause 3(5)).
 - c) the Secretary of State or the Minister for the Cabinet Office to change the enforcement authority (including by providing for there to be or not to be one) in relation to a particular description of decision or statement (clause 6(6)). Also, an enforcement authority will have the power to investigate suspected breaches, direct compliance and impose monetary fines.
 - d) the Secretary of State to determine, by regulations, the maximum monetary penalty for a person in scope of the Bill in breach of the provisions (clause 10(1)).
 - e) the Secretary of State to make provision about matters to which the enforcement authority must, or must not have regard in exercising its powers under clause 9 to impose monetary penalties (clause 10(2)).
 - f) the Secretary of State to make regulations in relation to (a) legislation repealed, revoked or modified by section 118 by the Procurement Act 2023 (repeals etc) before that Act comes into force, for the purposes similar to clause 12 on the relationship with procurement legislation or paragraph 2 of the Schedule, or (b) the Procurement Reform (Scotland) Act 2014 or any regulations under that Act (clause 14(6));
 - g) the Secretary of State to make regulations to exclude certain matters from the scope of section 17(5)(f) of the Local Government Act 1988 or Article 19(4)(f) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (S.I. 1992/810 (N.I. 6)) (clause 15(3));
 - h) Secretary of State to make transitional or saving provision in connection with the coming into force of any provision of this Act; and such regulations may make different provision for different purposes (clause 17(5)).

Of these nine delegated powers, (a), (b), (c), (f) and (g) are Henry VIII powers.

- I. **Clause 3(2), (3): Power to (a) add or remove considerations of a particular description, and (b) disapply the Act from a particular country or territory and decisions of a particular description**

Power conferred on: Secretary of State or Minister for the Cabinet Office

Power exercised by: regulations

Parliamentary Procedure: affirmative resolution / made affirmative procedure (depending on urgency)

a. Clause 3(2)(a),(c): Power to add, amend or remove decisions of a particular description from the list of exemptions in the Schedule

Context and purpose

7. The Bill includes a power for the Secretary of State or Minister of the Cabinet Office to add certain bodies and functions or descriptions of certain bodies and functions from the scope of the procurement restriction (clause 3(2)(a)). Clause 3(2)(c) also enables the Secretary of State or Minister for the Cabinet Office to amend or remove a description of decision or consideration added under previous regulations under clause 3(2).
8. This will allow Ministers to respond to changes and ensure that the scope of public bodies and activities covered by the ban is up to date.
9. As it stands, certain bodies and activities will immediately be excepted from the ban upon commencement of the Bill through clause 3(3) and paragraphs 1 to 3 of the Schedule. This includes, for example, Ministers of the Crown, GCHQ and the Security Service.
10. However, the power will enable the Secretary of State or Minister for the Cabinet Office to update the above list of excepted bodies and activities by way of regulations.

Justification for taking the power

11. The Department considers that a delegated power is necessary to ensure that only appropriate bodies and activities are caught by the Bill.
12. The prohibition will apply to ‘public authorities’ in accordance with section 6 HRA 1998; however, interpretations of section 6 HRA 1998 can create uncertainty which means that the Bill may, including as case law evolves, capture a range of bodies that it was not necessarily intended to apply to. It may be necessary to put beyond doubt that certain bodies (that are outside the scope of the intention to ban public bodies from boycotts and divestments) fall outside the definition of “public authority” for the purpose of the Bill.
13. In addition, the power will allow Ministers to deal easily with potential conflicts of law where a UK public body is operating overseas. For example, a UK body could theoretically find itself in a situation where its obligation to comply with the Bill contravenes the local law of the jurisdiction where it is operating overseas. Accordingly, the power to remove public bodies or certain functions of public bodies from the scope of the ban would help to deal with such potential circumstances because the ban can be adapted where Ministers, with Parliament’s consent, want to ensure that there is no conflict of law with the relevant overseas jurisdiction.

b. Clause 3(2)(b),(c): Power to add or remove considerations of a particular description from the list of exemptions in the Schedule

Context and purpose

14. The Bill includes a power for the Secretary of State or Minister of the Cabinet Office to remove considerations of a particular description from the scope of the procurement restriction. This will allow Ministers to respond to changes and ensure that the scope of public bodies and activities covered by the ban is up to date.
15. As it stands, decision-makers must not have regard to “a territorial consideration in a way that would cause a reasonable observer of the decision-making process to conclude that the decision was influenced by political or moral disapproval of foreign state conduct” when making a

procurement or an investment decision. A “territorial consideration” is a consideration that relates specifically or mainly to a particular foreign territory.

16. There are general exceptions to this ban in clause 3(1), in paragraph 4 to 9 of the Schedule. The ban does not prevent considerations of, for example, the financial or practical value of the goods, services, works or asset in question and national security.
17. However, the power will enable the Secretary of State or Minister for the Cabinet Office to update the above list of considerations and exceptions to the considerations by way of regulations.
18. Clause 3(2)(c) also enables the Secretary of State or Minister for the Cabinet Office to amend or remove a description of decision or consideration added under previous regulations under clause 3(2).
19. The regulations under subsection (2) may not result in a description of decision or consideration relating specifically or mainly to Israel, the Occupied Palestinian Territories, or the Occupied Golan Heights. This is to combat the so-called ‘boycotts, divestments and sanctions’ movement occurring against suppliers connected to these regions.

Justification for taking the power

20. The Department considers that a delegated power is necessary to ensure that only appropriate considerations are banned or permitted by the Bill.
21. There may, for instance, be certain environmental, social or governance considerations that we would not intend the Bill to catch, but where doubt could arise as to whether they cross the line into disapproval of foreign state conduct. This power would enable the Government to allay such concerns and clarify that certain considerations are always permissible.
22. In particular, the power would enable the Government to make sure that the Bill operates in a way that is consistent with the intended operation of the Procurement Bill, which provides for certain exclusion grounds relating to matters arising overseas. This delegated power will ensure that this Bill will continue to operate in harmony with current and future legislation.

c. Clause 3(5): Power to disapply Act in respect of certain countries or territories

Context and purpose

23. The aim of the Bill is to stop boycotts and divestment campaigns of public bodies that are not in line with UK foreign policy. However, there will be instances where a boycott or divestment campaign by a public body is in line with UK foreign policy. For example, the Government is currently encouraging public bodies to wind down commercial relationships with Russian and Belarussian companies due to Russia’s invasion of Ukraine. Thus, the purpose of the power is to enable the Secretary of State or Minister for the Cabinet to exempt such countries from the ban i.e., to allow public bodies to boycott or divest against those countries to express political or moral disapproval of the conduct of a foreign state.
24. It is intended that Russia and Belarus will be excepted from the BDS ban immediately on commencement. In other words, there will not be a gap between commencement and Russia and Belarus being excepted from the BDS ban.
25. The power is intended to be used only in exceptional circumstances i.e. where it is in line with foreign policy, rather than to remove large numbers of countries from the Bill. In addition, the

Secretary of State or Minister for the Cabinet Office will have the power to remove countries or territories from the disapplication of the ban by making further regulations.

26. The effect of the regulation is that the country or territory specified in the regulations were not a “foreign territory” for the purposes of section 1(6). The regulations under subsection (5) may not specify Israel, the Occupied Palestinian Territories, or the Occupied Golan Heights. This is to combat the so-called ‘boycotts, divestments and sanctions’ movement occurring against suppliers connected to these regions. Schedule 2 paragraph 1 inserts restrictions corresponding to the ban into the Public Service Pensions Act 2013. This includes a new clause 17B which is the corresponding power to disapply the ban in relation to a specific country or territory.

Justification for taking the power

27. The Department considers that the delegated power is necessary because there will be instances where boycotting and divesting will be in line with the Government foreign policy, and therefore the Secretary of State or Minister for the Cabinet Office will need the power to exempt those countries or territories from the ban i.e. to allow public bodies to boycott and divest if they wish. Thus, clause 3(5) of the Bill allows the Secretary of State or a Minister for the Cabinet Office to name countries or territories to which the ban on boycotts and/or divestment does not apply, even if it is temporary.
28. There are clear instances where the Government would want to disapply the ban in clause 1. The most recent (and prominent) example is the Government’s recent commitment to cease and/or reduce commercial relationships and/ or ties with Russian and Belarus companies owing to Russia’s invasion of Ukraine and Belarus’ support of the invasion.
29. However, if it is no longer appropriate to disapply the ban in respect of certain countries and/ or territories, the Secretary of State or Ministers for the Cabinet Office must be able to remove such countries or territories from the disapplication of the ban to subject them to the prohibition. That way, the power allows the Secretary of State or Minister for the Cabinet Office to ensure that the ban can be kept in line with the UK’s foreign policy.

d. Justification for the procedure for regulations made under clause 3(2), (5) of affirmative resolution or made affirmative procedure, depending on the urgency

30. The Department considers that the affirmative procedure is suitable for this measure because this level of scrutiny will provide a significant safeguard in removing public bodies or activities of public bodies from the scope of the ban and will allow for consideration and debate in both Houses.
31. The power will be subject to the affirmative procedure which we consider will be appropriate in most cases. However, clause 15(2) to (5) provide for a made affirmative procedure to be used in cases of urgency. The Department considers that the made affirmative procedure in such cases gives an appropriate level of scrutiny. The Secretary of State or the Minister for the Cabinet Office may need to react very quickly to international events, just like they did in response to Russia’s invasion of Ukraine. The made affirmative procedure allows the regulation to become law before Parliament has considered it. This is crucial as it allows the Secretary of State or Minister for the Cabinet urgently to apply the power. However, the Department acknowledges that Parliament should have an opportunity to scrutinise the power to ensure that it is appropriately used. As such, the Department considers that the option for the made affirmative procedure, when Ministers consider urgency is required, balances the need for Parliamentary

scrutiny before the measure takes effect against the importance of being able to use the power very quickly. The made affirmative procedure will only be used in cases of extreme urgency, otherwise the affirmative procedure will be used.

II. Clause 6(6): Power to add and remove enforcement authorities

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative Resolution

Context and purpose

32. The Bill will include an enforcement regime which will allow ‘enforcement authorities’ to (a) investigate non-compliance (b) direct public bodies to comply with the provisions of the Bill (c) impose monetary penalties for non-compliance. As it stands, enforcement authorities are defined in clause 6 and Schedule 2 of the Bill; it includes The Pensions Regulator (via the amendment of relevant pensions legislation in Schedule 2) and Office for Students in relation to pensions and Higher Education Providers, respectively. For all other public bodies, the Secretary of State or the Treasury will be the enforcement authority. However, as scope of the public bodies covered by the Bill changes, the respective enforcement authorities may also need to be updated to ensure that the most appropriate regulatory bodies are enforcing the Bill. The power to alter the enforcement power and to make consequential, incidental or supplementary provision includes power to amend any Act of Parliament, Act of the Scottish Parliament, Act or Measure of Senedd Cymru or Northern Ireland legislation, whenever passed or made.

Justification for taking the power

33. The Department considers that a delegated power is needed to add or remove enforcement authorities specified in clause 6. This power will allow the Secretary of State to update the list of appropriate enforcement authority for any given public body and specify their role in enforcement. Given the wide range of bodies captured in the Bill, as well as bodies whose functions may change or new bodies that may be set up in future, it is envisaged that the appropriate regulator may change over time, and any changes to the Bill would then require separate amendments each time. Therefore, a delegated power is required to enable amendments to clause 6 so that the list of enforcement authorities may be updated over time. The power to amend Acts etc is necessary to ensure that changes to the identity of the enforcement authority can include any necessary amendments to apply or modify, in relation to the powers under the Bill, wider provisions about how the enforcement authority exercises its functions.

Justification for the procedure

34. Provisions made under the power to add or remove enforcement authorities are subject to the affirmative resolution procedure. The procedure will allow Parliament to debate the need to update the meaning of enforcement authority, and consider the implications of making changes to the definition of enforcement authority. The exercise of this power may also have financial implications when it comes to enforcement costs the Department is responsible for covering.

III. Clauses 7, 8, 9: Enforcement measures

Power conferred on: Enforcement Authority

Power exercised by: Clauses 7, 8, 9

Parliamentary Procedure: none

Context and purpose

35. The Bill will include an enforcement regime which consists of powers for enforcement authorities to investigate if they have grounds to suspect non-compliance and issue compliance notices; and powers to impose monetary penalties on public authorities that breach the provisions of the Bill.
36. Clause 7 gives an enforcement authority the power to give a public authority an information notice; this allows the enforcement authority to request information to confirm whether the prohibition set out in clause 1 has been breached. Clause 8 allows the enforcement authority to issue a compliance notice where a public authority has breached or is likely to breach the prohibition set out in clause 1. Further, clause 9 of the Bill provides that where a public body breaches the prohibitions set out in clauses 23 or fails to comply with a notice given under clause 8, the enforcement authority has the power to impose a monetary fine.
37. As mentioned above, enforcement authority is defined in clause 6 as the Office for Students in relation to English higher education providers. For all other public bodies, the Secretary of State or the Treasury will be the enforcement authority.

Justification for taking the power

38. The enforcement authority needs the above powers to effectively enforce the ban. Where an enforcement authority has grounds to suspect non-compliance, they will need a power to obtain information from the public authority to prove or disprove that suspicion. It follows that, if a public body has contravened the prohibition set out in clause 1, the enforcement authority will need a power to direct compliance as per clause 8. If a public authority fails to comply with the compliance notice and thus continues to breach clause 1, then the enforcement authority needs a power to impose a monetary fine on the relevant public authority as per clause 9. This power will help to deter public authorities from breaching the Bill.

Justification for the procedure

39. The Department considers that the enforcement powers conferred on the relevant enforcement authorities do not need to be subject to any parliamentary procedure as the measures just give the relevant enforcement authority the powers to effectively enforce the provisions of the Bill. There is nothing unusual about the powers conferred on the enforcement authority. Furthermore, not only will these powers be scrutinised during the passage of the Bill, but they can always be subject to judicial review, if not used in accordance with usual public law principles.

IV. Clause 10(1), (2): (1) Duty to prescribe the maximum monetary penalty, and (2) power to make provisions about matters to which an enforcement authority must or must not have regard when issuing monetary penalties

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: Affirmative resolution

Context and purpose

40. Clause 9 of the Bill provides that where a public body breaches the prohibitions set out in clauses 1 or fails to comply with a notice given under clause 8, the enforcement authority has the power to impose a monetary fine. These monetary penalties are in addition to an enforcement authority being able to initiate judicial review proceedings (an existing remedy for enforcement authorities and any other person with standing) and/or the issuing of a compliance notice under clause 8. The power to impose monetary fines under clause 9 offers additional deterrence against failing to comply with the provisions of the Bill.
41. The Secretary of State must prescribe a maximum penalty (clause 10(1)) and may use regulations to set out matters to which the relevant enforcement authority must, or must not, have regard in exercising its power to impose a monetary penalty under clause 9 following a breach of the provision(s) of the Bill (clause 10(2)).

Justification for taking the power

42. The Department considers this power necessary because it will allow the Secretary of State to keep maximum penalties and considerations relevant to the imposition of monetary penalties under review and amend them if needed.
43. We expect that over time the matters to which an enforcement authority must have regard, and the circumstances in which it is appropriate for the enforcement authorities to decide to impose a monetary penalty, may change. We note that "have regard" considerations when exercising enforcement functions are commonly dealt with in subordinate legislation or lesser instruments – for example, the Regulator's Code issued under section 22 of the Legislative and Regulatory Reform Act 2006.
44. In addition, maximum monetary penalties may also need to be adjusted over time because of factors like inflation.

Justification for the procedure

45. The Secretary of State will have the duty to make regulations by an affirmative resolution procedure to decide the maximum monetary penalty, and power to make regulations to set out which factors must and must not be considered by an enforcement authority in exercising its power to impose a monetary fine under clause 9. The Department considers this procedure suitable as this power deals with the detailed operation of the enforcement regime, including elements that are likely to be needed to be updated regularly such as responding to inflation or operational changes as Government evaluates the implementation of the ban. The principles and main elements of the enforcement policy are set out on the face of the Bill for Parliament to scrutinise during the passage of the Bill.

- V. Clause 14(6): Power for the Secretary of State to make provision in relation to (a) any of the legislation repealed, revoked or modified by clause 118 of the Procurement Bill (repeals etc) before the Procurement Bill comes into force; or (b) the Procurement Reform (Scotland) Act 2014**

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: affirmative resolutions

Context and purpose

46. Clause 14(6) provides the Secretary of State to make regulations about the relationship between this Bill and:

- a) the Procurement Bill in relation to any of the legislation repealed, revoked or modified by section 118 of the Act for the purpose of ensuring there is no inconsistency between this Bill and the Procurement Bill before the Procurement Bill comes into force (which may not be until May 2024); or
- b) **the Procurement Reform (Scotland) Act 2014 or any of the regulations under that Act.**

47. The power will allow the Secretary of State to ensure that

- a) if this Bill is commenced before Procurement Bill, the existing provisions that the Procurement Bill will repeal and replace can be made subject to the operative provisions of this Bill. This will ensure there is no gap in the protection offered by this Bill; and
- b) **if there are conflicts between this Bill and Scottish procurement law, consequential changes are made in secondary legislation.**

Justification for taking the power

48. The Department considers this power necessary as the Procurement Bill has not yet received Royal Assent and it is not yet clear whether the Procurement Bill or this Bill will be commenced first. It allows the Secretary of State to apply the Bill to the legislation that the Procurement Bill is replacing or changing if it remains in force when this Bill is commenced.

49. The Department also considers this power necessary as, following discussions with Scottish government's procurement team, they advised that this Bill needed to be deconflicted with their procurement law regime.

Justification for the procedure

The Secretary of State will have the power to make regulations by an affirmative resolution. The Department considers this procedure necessary as these powers:

- a) make sure that the procurement law framework remains coherent both while we wait for the new Procurement Bill to come into force;
- b) make sure that this Bill does not conflict with Scottish procurement law; and
- c) are Henry VIII powers.

VI. Clause 15(3): Power for the Secretary of State to make regulations to exclude certain matters from the scope of section 17(5)(f) of the Local Government Act 1988 or Article 19(4)(f) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (S.I. 1992/810 (N.I. 6))

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: affirmative resolutions

Context and purpose

50. Clause 15(3) provides the Secretary of State to make regulations to exclude certain matters from the scope of section 17(5)(f) of the Local Government Act 1988 and the equivalent Northern Ireland legislation.
51. Section 17 of the Local Government Act 1988 imposes a duty on certain public authorities to not consider certain non-commercial matters in procurement decisions. Section 17(5)(f) includes “any political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees” as a non-commercial matter.
52. The power will allow the Secretary of State to avoid conflicts between this Bill and section 17(5)(f) of the Local Government Act 1988 and its equivalent Northern Ireland legislation.

Justification for taking the power

53. The Department considers that this power is necessary to make sure that the procurement law framework remains coherent.
54. Section 17(5)(f) could restrict the activity we may open to public bodies by exempting a country under clause 3(5) of the Bill. However, as section 17(5)(f) is broader than the scope of the potential conflict with the Bill, we do not want to repeal the section in its entirety. This power ensures that we can continue to maintain section 17(5)(f) as far as is possible until a case arises where it may conflict with the Bill.
55. Note, in contrast, in clause 15(2) of the Bill we have expressly omitted section 17(5)(e) of the Local Government Act 1988, as the scope of (e) (“the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors”) directly overlaps with and therefore conflicts with the scope of ban in clause 1 of the Bill.

Justification for the procedure

The Secretary of State will have the power to make regulations by affirmative resolution. The Department considers this procedure necessary as this is a Henry VIII power to make sure that the procurement law framework remains coherent.

VII. Clause 17(5): Power for the Secretary of State to bring the Bill into force and make transitional provision and savings

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: none

Context and purpose

56. Clause 17(3), (4) brings the specified clauses into force on the day on which the Act is passed. Clause 17(5) gives the Secretary of State power to bring the remaining provisions of the Bill into force on such day as the Secretary of State may appoint by regulations. It also provides those different days may be appointed for different purposes. Clause 17(5) gives the Secretary of State power to make transitional or saving provision in connection with the coming into force of any provision of the Bill. Again, it provides that different provision may be used for different purposes.

Justification for taking the power

57. This power will enable the Secretary of State to commence the provisions of the Bill at a suitable time. As confirmed in clause 17(1), the Bill is UK wide, but there are differences in how the Bill will be enforced throughout the UK. Therefore, the Secretary of State may need to commence the provisions at different times in different territorial areas. It will allow the Secretary of State to commence the enforcement provisions only once the enforcement authorities are ready to undertake their role. For example, the Office for Students and The Pensions Regulator in relation to universities and the Local Government Pension Scheme, respectively, may need time after the Act is enacted to ensure that they have the appropriate systems in place to enforce the Bill.

Justification for the procedure

58. The Department considers that the power to make commencement regulations does not need to be subject to any parliamentary procedure as it only sets the date on which the provisions will come into force. The substance of such provisions will be considered during the passage of the Bill through Parliament. This also applies to the related power to make transitional provision and savings, which is intended to ensure a smooth transition between any existing measures and the Bill and will only deal with technical aspects of that which will have a temporary effect.

Department for Levelling Up, Housing and Communities

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