

Merger Control 2024

13th Edition

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Overview of merger control activity during the last 12 months

The Federal Competition and Consumer Protection Commission (the **Commission** or **FCCPC**) has not released data on its merger control activities since 2019, when the Commission published in its Annual Report that it had received and approved 38 notifications in 2019.¹ Hence, there is no reliable or comprehensive data on the number of notifications received since 2019 and the stage at which mergers were approved or prohibited. However, from market information, deal announcements and interactions with the Commission, we note that the number of merger control notifications have been on the increase year on year, particularly in respect of transactions which qualify as large mergers, as defined by the Federal Competition and Consumer Protection Act (**FCCPA** or the **Act**). While the Commission is empowered by the Act to publish a notice of merger notifications received as well as a notice of its decisions in the Federal Government Gazette, the Commission is not yet in the practice of making such publications. However, the Commission published in March 2023 a proposed remedy package with respect to a proposed transaction.² This is the first transaction that is publicly available where the Commission found that the proposed acquisition could significantly lessen competition and required the acquirer to propose remedies. With respect to this transaction, the Commission found the remedy package suitable and approved the merger.

New developments in jurisdictional assessment or procedure

With respect to jurisdictional assessment and procedure, the Commission published in 2020 its Merger Review Regulations 2020 (the **MRR**) and Merger Review Guidelines (the **MRG**) pursuant to powers conferred by the Act. In the MRR, the Commission detailed the substantive and procedural requirements for merger notifications, provided guidance on the regulatory review process, clarified the process for merger notification and efficient handling of notified cases, and prescribed the procedure for remediation and disposition

of notified merger cases. The MRG expands on the procedural and substantive framework under the MRR, expounding the principal analytical techniques, practices and the enforcement policy of the Commission with respect to mergers. The Commission also issued an array of other regulations between 2020 and 2022, including the FCCPC (Administrative Penalties) Regulations (2020), Guidance Note on Gun Jumping (2020), Notice in respect of Indicative Timeframes for Merger Notification and Review Process (**Notice of Merger Timeframes**), the Merger Review (Amended) Regulations 2021, Investigative Cooperation/ Assistance Rules & Procedures (2021) and the Notice on Market Definition, Abuse of Dominance Regulations, and the Leniency Rules 2022. The Commission has largely followed the substantive and procedural requirements and the analytical techniques and practices set out in the regulations and guidelines that it has issued.

The Commission reviews domestic mergers which would: (a) result (directly or indirectly) in a change in control of a business in Nigeria (the control test);³ and (b) meet the turnover threshold prescribed by the FCCPC (the turnover test).⁴ The conditions are contemporaneous, and a notifiable transaction must pass both tests. The Commission reviews both domestic and foreign-to-foreign transactions that meet the prescribed control and turnover thresholds. However, only foreign-to-foreign transactions that have a local component/nexus come within the FCCPC's regulatory purview, including cases of indirect control, regardless of how far removed they are from the local undertaking.⁵ We have considered below certain merger situations or arrangements, and the Commission's likely approach based on relevant guidelines and the Commission's practice.

Acquisition of minority shareholding

The Commission reviews mergers where minority shareholders have the ability to exercise material influence. The Commission conducts a case-by-case analysis in determining whether the acquirer has "material influence", in which it considers the distribution of shareholding, whether the acquirer's shareholding makes it the largest shareholder, voting power and other factors that will enable the acquiring party to exercise indirect control over the target. Generally, under Rule 6 of the MRR, the acquisition of shareholding or voting rights above 25% confers upon an acquirer a rebuttable presumption of the ability to materially influence policy, while the acquisition of shareholding or voting rights below 15% will not, in general, lead to the FCCPC's review. In addition, in relation to the acquisition of minority shareholding, the FCCPC also considers: (a) the likelihood of interdependence between competitors that would lead to muted competition or coordinated conduct, in the case of acquisitions between horizontal undertakings; (b) the likelihood of an increase in the acquirer's incentive to foreclose rival suppliers, in the case of vertical or conglomerate acquisitions; (c) access to commercially sensitive information about competitors; and (d) blocking of potentially pro-competitive mergers and rationalisation. The FCCPC regards the above as potentially anti-competitive effects, and a relevant merger situation will be said to arise such that the impact of the transfer of control shall be assessed by the Commission. The Commission generally complies with the assessment criteria that it has prescribed. Except where potentially anti-competitive effects are discernible, merger notifications that are based on minority shareholdings are typically approved.

Warehousing arrangements

On warehousing, Part II of the MRR provides for the scope of the FCCPC's jurisdiction over mergers, and its description of merging parties is quite broad, covering direct and indirect acquisition or establishment of control over the whole or part of the business by way of

acquisition of shares or assets, the amalgamation or combination of undertakings or joint ventures. Part II of the Commission's Notice of Merger (Forms 1 (Detailed submission) and 2 (Simplified Procedure)) requires merging parties to provide a detailed description of the structure of ownership and control of each of the undertakings concerned before and after the completion of the merger. This implies that merging parties with any warehousing arrangement must fully disclose this to the FCCPC, to provide a transparent view of the ownership and control structures. The nature of information required in Part II of the Notice of Merger prevents any obscurement of true ownership and control. While there is no public information regarding any case of warehousing with respect to the Commission's review of mergers, we note that the Commission would most likely consider a warehousing arrangement to amount to gun-jumping, particularly where the parties' agreement contains a clause providing for activities that cannot be reversed at a later time, which imply the expenditure of a significant amount of resources by the parties or their agents, or where the activities of the parties before and after the merger notification indicate an integration of the parties' businesses prior to obtaining the Commission's approval.

Acquiring control in stages

The FCCPC's regulations also address creeping mergers in Rule 8 of the MRR, that is, successive transactions that individually do not meet the notification threshold but cumulatively do. These transactions can be scrutinised and potentially rolled back if any violation occurs.⁶

Pre-notification consultation

The Commission recommends in Regulation 10 of the MRR that parties request a pre-notification consultation with the Commission to assist in determining the course of a case, at least two weeks before submission of formal notification is contemplated. The essence of the pre-notification consultation is to enable the FCCPC and merging parties, prior to notification, to discuss issues such as whether or not a merger is required to be notified, whether a simplified or expedited procedure may be merited, the calculation of annual turnover, value of assets, market shares, merger notification filing fee and supporting documents required for the notification, and the scope of the information to be submitted. Such consultations may take place via telephone, video conference or other digital means.

By law, a small merger is not notifiable except where parties choose to voluntarily notify, or the FCCPC has determined that such merger has the likelihood of lessening competition. In the latter case, the FCCPC can require a notification.

Simplified and expedited procedure

Generally, the notification is done by completion and submission of Form 1 and the payment of the filing fee, however, the simplified procedure (Form 2) may be used where (upon a self-assessment) the merger parties take the view that the proposed merger is less than likely to prevent or lessen competition and no further evidence will likely be uncovered to revise this finding.⁷ Form 2 may be considered in the following cases: (a) small mergers that have been voluntarily notified and have not been prompted by the Commission; (b) where none of the merger parties are active or potentially active in the same product or geographic markets, or in any product market(s) which is upstream or downstream of a product market(s) in which another merging party involved is active or potentially active; (c) where two or more of the merging parties are active in the same

product or geographic market, but their combined market share is less than 15%; (d) where one or more merging parties are active in any product market(s) which is upstream or downstream of a product market(s) in which another merging party is active, but the market share of each of the parties in each market is less than 25%; and (e) where an undertaking involved, which already has joint control over a company, is to acquire sole control over that company.⁸

The Commission also has an expedited procedure upon payment of the expedited fees, which is aimed at reducing the relevant timeframe for all applicable processes during the Phase One Review by 40%. Parties are advised to discuss with the Commission during pre-notification consultations the suitability of using the simplified and/or expedited procedure. The Commission reserves the power to refer any transaction to the normal procedure where it appears that the circumstances presented for the simplified or expedited procedure are either inaccurate or improper.

Mergers that qualify as large mergers but raise no competition concerns are typically approved with minimal delay, though it is typical for parties seeking to obtain approval expeditiously to apply using the expedited procedure and pay the expedited fees. The Commission has kept its promise of reducing the merger review timeframe by up to 40% in such cases.

The Commission's approach to gun-jumping

The Act proscribes gun-jumping and by its provisions, any gun-jumping activity is void and can be declared void by the Commission. Gun-jumping is also an offence for which the merging parties may be liable to a fine of (not exceeding) 10% of the turnover of each party involved in the preceding financial year.⁹ Rule 13 of the MRR also provides for standstill obligations until the merger has been approved by the Commission.¹⁰ Regulation 13(5) provides that, if a party is found to violate the standstill obligations, the FCCPC may impose an administrative penalty as prescribed by the Administrative Penalties Regulations 2020. The Commission has over the past few years taken a stricter approach to enforcement, handling cases of gun-jumping and penalties. In the past 12 months, the Commission has requested that certain transactions be notified to it, though the parties had for some reason considered the transactions not notifiable. However, in many of these cases, we have seen the Commission request that the parties notify the transactions to it, rather than impose penalties for failure to notify. We are not aware of any challenge to a decision of the Commission with respect to merger notifications.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

From deal announcements, market information and our interactions with the Commission, we note that the key industry sectors where there have been more significant merger activity in the past 12 months are oil and gas, manufacturing (FMCGs) and insurance. We also note merger activity in the telecommunication sector and financial market infrastructure (FMI). As the Commission has not published its decision with respect to the transactions, we are unable to comment on the Commission's approach to market definition with respect to these key industry sectors, except for the FMI sector, where the Commission, in its publication of the remedy package proposed by the acquirer in relation to a proposed acquisition of an approximately 21% stake in a securities depository, identified the relevant market as the securities depositories market in Nigeria.¹¹

Generally, the Commission assesses relevant markets from two dimensions: the product dimension and the geographic dimension.¹² The relevant product market is defined in terms of products and the set of products that customers consider to be close substitutes, while the relevant geographic market is defined in terms of the location of suppliers and includes those suppliers that customers consider to be feasible substitutes. The relevant geographic market may be local, statewide, regional, national or wider (transcending national boundaries).

According to the guidance provided in the MRG and the Notice on Market Definition issued by the Commission in 2021, the market definition analysis begins by assuming a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would profitably impose a small but significant and non-transitory increase in price (**SSNIP**), assuming the terms of sale of all other products remained constant. The SSNIP test considers whether an undertaking(s) within the “market” (i.e. the market as it is defined by the proposed market definition) is able to increase the price of Product X by around 5% to 10% (i.e. the good or service which they produce or supply), for an enduring period of time, without experiencing demand-side substitution or supply-side substitution as a measure of the competition within that market. If producers with a market (however described) cannot collectively increase the price of Product X without worrying about substitution, then the SSNIP test concludes that there must be “close competition” within that market. Therefore, in such a case, the SSNIP test helps define the “relevant product market” to include not only Product X, but also the substitute that customers resort to or the products that are already being produced by the suppliers that are able to influence a switch, in response to a SSNIP by the producers of Product X. In other words, if the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the putative candidate market is not the relevant market, and the next-best substitute is added to the candidate market. The analysis then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would profitably impose a SSNIP. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one product of the merging parties in the candidate market. In general, the smallest set of products in which the price increase can be sustained is defined as the relevant product market.

The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where a merging party produces or sells the relevant products. As demonstrated above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a SSNIP by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified.

There are also situations when a precise market definition is deemed necessary. The Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets, and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for

different levels of production or distribution of the products/services in question. It might also request additional information from the undertakings involved.

A key component of the Commission's analysis of competitive effects is whether timely entry by potential competitors would likely occur on a sufficient scale and with sufficient scope to constrain a material price increase in the relevant market. The entry of new firms into a market can provide an important source of competitive constraint for incumbents. Entry or expansion is only effective in constraining the exercise of market power when it is likely, timely and sufficient in scale and scope. When determining whether potential entry is likely to be timely, the Commission considers the barriers to entry, as well as factors such as the frequency of transactions, the nature and duration of contracts between buyers and sellers, lead times for production and the time required to achieve the necessary scale. Barriers to entry or expansion can be: legal or regulatory (e.g. licensing conditions, tariffs, explicit restrictions on the number of market participants and other government regulations; environmental regulations that raise the costs of entry or limit the ability for customers to switch suppliers); structural or technological barriers (including the existence of sunk costs, substantial economies of scale which may limit the viability of entry below a certain minimum efficient scale, high customer switching costs, etc.); strategic barriers that arise because of actions or threatened actions by incumbents to deter new entry by virtue of being incumbents in the market; or technological or other types of entry barriers. Merging parties have the responsibility of demonstrating that entry or expansion will be timely, likely and sufficient such that a merger will not lead to a substantial prevention or lessening of competition (**SPLC**).

Additionally, the Commission considers the impact of international competition on the market. Where the Commission can be satisfied that import competition, or the potential for import competition, provides an effective constraint on domestic suppliers, it may consider it unlikely that a merger would result in an SPLC. While the current or historic levels of imports may indicate the competitive role of imports in the relevant market, the Commission shall consider the potential for imports to expand if the merged undertaking attempted to exercise increased market power post-merger. Another way in which international competition is relevant to the Commission's evaluation of a merger is in the context of public interest. The Act in Section 94(4) provides that where a proposed merger is likely to lessen competition, the Commission will consider further the effect that the merger or proposed merger will have on the ability of national industries to compete in international markets, to justify the approval of the merger on grounds of public interest. Where the ability of national industries to compete in international markets will result in significant benefits to the domestic economy, the Commission is likely to grant its approval. The Commission would typically rely on information from firms operating in markets that involve international trade in its analysis to determine whether a proposed merger will lead local players to increase output owing to greater exports or import substitution.¹³

Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The Commission assesses the competitive effects of a merger based on the theories of competitive harm, with the aim of determining whether a proposed merger will make the post-merger market structure less competitive than the pre-merger structure. The theories of harm advanced by the Commission depend largely on the type of merger under

its investigation. Typically, the Commission will consider three main theories of harm when analysing the competitive effects of a merger:

- (i) Unilateral effects, which arise where the newly merged entity leverages its increased market power to remove or weaken competitive constraints. In doing so, the entity may find it profitable to raise prices, reduce output or otherwise exercise its market power to the detriment of competition, regardless of the response of other market participants. The Commission notes in the MRG that unilateral effects are more likely to occur in the cases of homogenous and differentiated product markets if the main competitive constraint pre-merger was the other party to the merger. Meanwhile, in the context of bidding and bargaining markets, a merger between two sellers, for example, would lead to unilateral effects by preventing buyers from playing two sellers against each other to obtain a better price. In its assessment of unilateral effects, the Commission evaluates the likely competitive responses of rivals, including whether rivals in the market are likely to expand production, reposition their products or extend their product line to discipline unilateral market power that would otherwise occur as a result of the merger.¹⁴ The Commission also considers existing sellers that may only occupy a particular niche within the relevant market and whether they provide an alternative for a sufficient number of buyers. In addition, the likelihood and likely impact of entry is considered. When assessing the extent of competition between the products of the merging firms, the Commission examines, among other possible factors, past buyer-switching behaviour in response to changes in relative prices, information based on buyer preference surveys, win-loss records, and estimates of own-price and cross-price elasticities.¹⁵ The Commission also considers whether the broader actual and potential competitive constraints – such as new entrants, imports or countervailing power – will limit any increase in the unilateral market power of each remaining market participant.¹⁶ The Commission considers the likely post-merger environment and assesses the strength of existing competition, barriers to expansion and product repositioning, switching costs and dynamic effects.¹⁷ The MRG provides for some empirical tests – diversion ratios, survey evidence, residual spend analysis and impact analysis – which the Commission applies in testing for unilateral effects.¹⁸ Through these empirical tests, the Commission applies econometric techniques for merger analysis.
- (ii) Coordinated effects, which occur where a merger assists firms in the market to implicitly or explicitly coordinate their pricing, output or related commercial decisions. A merger may have this effect by: reducing the number of market participants among which to coordinate; removing or weakening competitive constraints; or altering certain market conditions that make coordination more likely. Ultimately, post-merger, following structural changes in a market, competing firms may find it more beneficial to come to an implicit understanding among themselves to refrain from competing. As such, during a merger review, the Commission will consider whether a merger would create conditions whereby unlawful coordination becomes more likely. In particular, the Commission will consider three conditions which must be met for coordination to be possible, namely: (a) undertakings must be able to reach and monitor the terms of coordination; (b) coordination must be internally sustainable, in that, within the coordinating group, there is an incentive for undertakings to comply with the coordinated outcome; and (c) coordination must be externally sustainable, such that it is unlikely that it can or will be undermined by market participants outside the coordinating group.¹⁹ In the absence of credible

contrary evidence, previous overt or tacit coordinated behaviour will be considered an indicator of possible or likely coordination post-merger. The Commission will, however, consider whether conditions of coordination have been strengthened or weakened as a result of the merger.²⁰

- (iii) Vertical and conglomerate effects, which are non-horizontal effects from non-horizontal mergers. Generally, non-horizontal mergers raise no competition concerns; however, the merged firm may rely on such a merger to increase its unilateral market power by “foreclosing” rivals. In a vertical merger, a merged entity could foreclose rivals by: (i) charging a higher price for an important input into the production processes of downstream competitors; (ii) limiting or denying access by downstream and non-integrated competitors to essential inputs, thereby forcing them to use expensive and inferior quality alternatives; (iii) limiting or denying access by upstream competitors to a sufficient customer base; and (iv) raising the cost of entry by upstream competitors to a sufficient customer base. Meanwhile, in a conglomerate merger, this could occur where the merged entity is enabled to alter its operations or product offerings in a way that can limit or raise the cost of a rival entity’s access to a sufficient customer base and/or deny access to customers altogether. In order to determine whether a foreclosure is likely to increase the unilateral market power of the merged entity, the Commission will consider the merged entity’s ability and incentive to foreclose and the potential effect of such foreclosure.²¹

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Second stage investigation would typically be preceded by: (i) a first detailed review, pursuant to which the FCCPC forms the view that a merger is likely to give rise to an SPLC; and (ii) a state-of-play meeting informing the merging parties of the result of the FCCPC’s market testing, issuance of an issues paper setting out the initial findings of the market testing, key competition concerns raised by the merger including the theories of harm and summary of third-party views on the merger. The merging parties would thereafter present a written response addressing the concerns raised in the issues paper, and propose remedies as applicable. After consideration of the written responses, the FCCPC may find that the merger is still likely to substantially prevent or lessen competition and the remedies proposed by the merger parties do not address the competition issues identified.²²

While it is obvious that the FCCPC would consider each merger transaction on a case-by-case basis, the Commission has made clear in the MRG that in assessing the effectiveness of remedies in addressing the adverse effects of the merger on competition, it would consider the duration, practicality and risk associated to such remedies, and if the remedies are tailored to the competitive harm.²³ Furthermore, remedies can be structural, behavioural or a combination of both. In terms of structural remedies, this would typically involve the disposal of a business or assets from the merger parties to create a new source of competition (if sold to an existing competitor). Behavioural remedies are ongoing measures to modify, regulate or constrain the future conduct of merger parties. The MRG clearly also states that the FCCPC will favour structural remedies over behavioural remedies because they are generally more clear-cut in restoring competition and rarely require monitoring and enforcement once implemented.²⁴

However, from a practical perspective, the FCCPC demonstrated willingness to accept a combination of structural and behavioural remedies proposed as a remedy package in

the proposed acquisition of a 21.61% stake in Central Securities Clearing System Plc. by FMDQ Holdings Plc. (FMDQ Group).²⁵ Further to its initial review of the notification, the FCCPC determined that the transaction would substantially lessen competition in the securities depository market and that the transaction was not approvable without the implementation of appropriate remedies which could address the theory of harm arrived at by the FCCPC. The FCCPC, upon receipt of the remedy package, published it and invited comments, feedback, opinion or other information considered vital to its consideration of the remedy package from stakeholders in the relevant sector and other interested parties. Interestingly, the structural remedy in this case was not in terms of divestiture, rather a relinquishment of the acquirer's right to board representation.

It is important to note that this is the first instance, from publicly available information, where the FCCPC requested a remedy package and accepted a combination of structural and non-structural remedies. In the same vein, it is yet to be seen what approach the FCCPC would adopt in another circumstance. While this case provides guidance in relation to remedies proposed in order to avoid second stage investigations, there is little or no publicly available information on remedies that the FCCPC would accept following a second stage investigation, or what the approach of the FCCPC would be in this regard.

Key policy developments

There have not been any major policy developments in the Commission's work in relation to merger control over the past 12 months. Please refer to the section above on "New developments in jurisdictional assessment or procedure" for some regulations issued by the Commission between 2020 and 2022. However, over the past year, we have noted a strengthening of the Commission's monitoring functions with respect to cases where parties had proposed remedies that the Commission accepted, and cases where the Commission had approved a merger subject to such monitoring. Additionally, the Commission has demonstrated consistency in its market watch, investigation of and clamp down on gun-jumping and anti-competitive behaviour. The Commission has also been consistent in utilising its legal framework to enforce fair competition and consumer protection.

Reform proposals

The FCCPC has not indicated any reform proposal, though it continues to work at addressing gaps in the current regulatory regime through the issuance of regulations, guidelines, circulars and the implementation of these regulations. The Commission continues to work at maintaining fair competition and consumer protection standards in Nigeria.



Endnotes

- 1 Available at <https://fccpc.gov.ng/wp-content/uploads/2022/07/annual-report.pdf>.
- 2 Available at <https://fccpc.gov.ng/publication-of-a-proposed-remedy-package-proposed-acquisition-of-21-61-stake-in-central-securities-clearing-system-plc-by-fmdq-holdings-plc-fmdq-group>.
- 3 Section 92(2).
- 4 As prescribed by the Commission in the Notice of Threshold for Merger Notifications 2019.
- 5 Regulation 22 of the MRR.

- 6 Section 96(7) of the Act and the FCCPC (Administrative Penalties) Regulations (2020). Refer to our notes on the Commission's approach to gun jumping, also under the section on "New developments in jurisdictional assessment or procedure".
- 7 Regulation 21 of the MRR.
- 8 *Ibid.*
- 9 Section 96(4)–(7) of the Act.
- 10 Paragraph 3.60 of the MRG 2020.
- 11 See endnote (2) above.
- 12 Regulation 25 of the MRR; section 71 of the Act.
- 13 Paragraphs 8.30 and 8.31 of the MRG.
- 14 Paragraph 7.13 of the MRG.
- 15 Paragraph 7.14 of the MRG.
- 16 Paragraph 7.22 of the MRG.
- 17 Paragraph 7.23 of the MRG.
- 18 Paragraph 7.31 of the MRG.
- 19 Paragraph 7.35 of the MRG.
- 20 Paragraph 7.36 of the MRG.
- 21 Paragraphs 7.44 to 7.63 of the MRG.
- 22 Regulation 17 of the MRR.
- 23 Articles 9.4–9.9 of the MRG.
- 24 Article 9.10–9.15 of the MRG.
- 25 See endnote (2) above.



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- New developments in jurisdictional assessment or procedure
- Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.
- Key economic appraisal techniques applied, e.g., as regards unilateral effects and coordinated effects, and the assessment of vertical and conglomerate mergers
- Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation
- Key policy developments
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