Employment Newsletter

The CMS Employment and Pensions Practice Area Group (Employment Group) consists of the partners and associates of the different labour departments across the CMS firms. We offer coordinated European advice through a single point of contact.

The group consists of eight established European law firms. Based in thirteen European jurisdictions, we have a long history of close association and command strong positions, both in our respective homes and on the international market. Individually we bring a strong track record and extensive experience. Together we have created a formidable force within the world's market for professional services. The member firms operate under a common identity, CMS and offer clients consistent and high quality services.

The CMS Employment Group advises on labour law and social security issues affecting business across Europe. The group was created in order to meet the growing demand for integrated, multi-jurisdictional legal services.

Employment and pensions issues can be particularly complex as there is such a wide range of different laws and regulations affecting them. The integration of our firms across Europe can simplify these complexities, leaving us to concentrate on the legal issues without being hampered by additional barriers.

This is the second Newsletter issued by the Employment Group. It is anticipated that the Employment Group will issue two to four Newsletters per year. The objective of the Newsletter is to give information on different aspects of European labour law. Future Newsletters will also contain aspects of national law.

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EC Information and Consultation Directive

With the EC Information and Consultation Directive ("the Consultation Directive") the European legislative has created a minimum standard of information and consultation rights within the EU. If properly implemented it ensures employees' participation in employers' decision making. The time limit for transposition of the Consultation Directive approaches. National legislation to implement the Consultation Directive must generally be adopted by 23 March 2005. This article gives an outline of the key requirements and considers the impact the Consultation Directive will have on two key member states, the United Kingdom and Germany.

1. Introduction

The Consultation Directive came into force on 23rd March 2002 after years of difficult debate. Difficulties arose largely because member states, employers' organisations and trade unions did not agree on the desirability of having an EU framework for information and consultation. One problem has been a widespread resistance to giving employees a legal right to participate in their employers' decision-making. Another fundamental problem has been the wide variety of information and consultation structures which already exist in the different member states. For example, in the United Kingdom there is very little legislative control of employee representation. This means that the impact of the Consultation Directive will be far reaching. In other countries such as Germany and France there is a well-established tradition of state regulation in this area. This means that in these countries there will be limited impact.

2. Key points of the Consultation Directive

The Consultation Directive does not apply to small undertakings because it was thought that its requirements might hinder their creation and development. Member states can choose to apply the provisions of the Consultation Directive to:

- "undertakings" (interpreted as a legal entity e.g. a limited company) employing at least 50 employees in any one member state; or to
- "establishments" (interpreted as unit of business not necessarily a separate legal entity) employing at least 20 employees in any one member state.

The Consultation Directive provides for minimum rights of information and consultation of employees and leaves it up to the member states to determine appropriate procedures in compliance with the principles set out in the Consultation Directive.

The Consultation Directive does not set out detailed practical arrangements for informing and consulting employees although it is clearly envisaged that this will be through employee representatives.

National implementation must ensure:

- the information which is provided to the employee representatives must contain all the relevant data; and
- information must be provided at a time and in a manner which enables the employees' representatives to examine the information and, if appropriate, to give them sufficient information to prepare for consultation (dialogue with company representatives).

Consultation requires the exchange of views and establishment of dialogue between the employees' representatives and the employer.

The topics covered by the information and consultation requirements are:

- information on the recent and probable development of the undertaking's or establishment's activities and economic situation; and
- information and consultation on the situation, structure and probable development of employment and on any anticipatory measures envisaged, particularly where there is a threat to employment; and
- information and consultation on decisions which are likely to lead to substantial changes in work organisation or contractual relations, including collective redundancies.

The Consultation Directive also gives member states the freedom to specify that the practical arrangements for informing and consulting employees can be set by voluntary negotiated agreements including existing agreements between management and the workforce. Such agreements can contain arrangements for information and consultation which differ from those set out in the Consultation Directive provided they meet minimum levels of requirement.

3. United Kingdom

At present the UK has limited information and consultation rights and obligations. Although large multinational companies will have European Works Councils, UK businesses are not currently required to inform and consult their employees except in limited circumstances. These are restricted to collective redundancies, transfers of businesses (under the Transfer of Undertakings (Protection of Employment) Regulations 1981) and health and safety issues. The new provisions will therefore have a fundamental impact on UK businesses and will involve significant administrative and cultural change.

On 7th July 2004 UK implementing regulations were published in draft along with draft guidance and a Government response to earlier consultation. The UK has decided that the new information and consultation obligations will apply to "undertakings" i.e. legal entities such as a limited company, rather than to "establishments". They will apply to undertakings whose registered office,

head office or principal place of business is in Great Britain.

In the UK there will be a transitional period for implementation of the Directive. The regulations will apply to undertakings with

- 150 or more employees - from 6 April 2005;
- between 100-149 employees - from 6 April 2007;
- between 50 and 99 employees - from 6 April 2008.

As the UK is unused to involving employees in decision making, the new regulations concentrate on the structure of any new arrangements. The requirement to inform and consult employees is triggered either by a formal request from employees for an information and consultation (I&C) agreement, or by employers starting the statutory process themselves. It is important to note that there is no automatic requirement to put information and consultation procedures in place and the process must be actively triggered by either the employer or employees.

Where employees make a request, or employers start the process themselves, there will be a period for drawing up and agreeing the on going I&C arrangements to be put in place. UK businesses are free to draw up whatever arrangements and structures they want - as long as they have been agreed with the employees/negotiating representatives. However where no agreement is reached, certain "standard" provisions will apply requiring the employer to inform and consult on specified matters and in a specified way.

Many UK businesses have already set up arrangements to inform and consult staff in anticipation of the new obligations. If pre-existing arrangements are in place when an employee requests new arrangements, the employer may ballot the workforce to determine whether they endorse the employee request, or whether they are happy with what they have. Only if the workforce endorses the request would the employer come under the obligation to negotiate a new agreement.

Most disputes will be handled by the Central Arbitration Committee (CAC). If a complaint is upheld, the CAC can make an order requiring steps to be taken to put the fault right and, in addition, the employer may have to pay a fine of up to £75,000. At present, there are no provisions for any award to be paid to affected employees.

4. Germany

As information and consultation rights are already well established in Germany, the Consultation Directive should not have fundamental effects in Germany. In general the information and consultation rights provided in Germany already exceed the requirements of the Consultation Directive.

The information and consultation rights of employee representatives for private companies are set out in the Works Council Constitution Act (Betriebsverfassungsgesetz). This regulates the establishment of works councils and in particular their rights to information, consultation and co-determination in the business unit. Works councils have differing rights depending on the situation.

Sometimes they need only be informed. In other circumstances management is obliged to discuss certain topics with the works council or to consult on certain action, e.g. dismissal of an employee. In some cases the works council and the management must reach an agreement on certain topics (e.g. distribution of working hours, requirements to work overtime, disciplinary regulations, introduction and application of technical installations, etc.).

However, there are some issues which may need to be addressed to ensure that Germany fully complies with the Consultation Directive.

- One is the situation where a works council does not exist. A works council is not compulsory. It is only a right that can be exercised by the employees. But where no works council is established management does not have information or consultation duties vis-à-vis the employees (subject to clearly defined special cases, e.g. transfer of undertakings). This raises the question whether German law needs to be amended with regard to the information and consultation of employees in establishments without a works council. If German law does need amending a provision which ensures that at least the affected employees themselves are provided with information and consultation may be appropriate. However, current German law gives employees the right to elect works councils irrespective of the wishes of the employer. Therefore it is up to the employees whether they get information and whether they are consulted. The UK implementing regulations, for example, leave it up to the parties (i.e. the employer or employees) to decide whether, and what information and consultation arrangements are made. It seems to us that the employees' right to establish a works council which has information and consultation rights is sufficient and complies with the Directive. Therefore we consider that the German law does not need to be amended in this respect.
- There are two provisions in Germany dealing with the obligation to inform on economic issues.
  The first is an extensive provision which requires an economic affairs committee to be informed in due time and in detail about economic matters. This would comply with the Directive except for the fact that it only applies to undertakings with more than 100 permanent employees. Some commentators therefore conclude that the threshold should be reduced to comply with the Consultation Directive.

  The second provision is a more general provision. It provides that the employer must inform employees in co-ordination with the works council about the economic situation and the undertaking's development at least once a quarter. As this provision applies to undertakings with more than 20 permanent employees we consider that this second provision is sufficient to comply with the Consultation Directive.
- Some amendments may be necessary regarding the information and consultation on employer's decisions which are likely to lead to substantial changes in work organisation or contractual

relations. Although there is a current provision in German law that provides for information and consultation on operational changes to the undertaking, e.g. closure of business units, relocation, restriction of the undertaking, changes of the business unit organisation, etc. the contents of the Consultation Directive seem to be slightly different.

The German Ministry for the Economy and Employment is currently examining whether and, if so, what amendments are necessary to bring the existing statutory regulations into line with the Consultation Directive. At the moment it is unclear whether and, if so, what amendments will ultimately be made. However, extensive amendments seem unlikely.

5. Conclusion

Information and consultation rights will remain unharmonised across Europe not least because the Directive allows member states to make different choices. For example the UK has chosen "undertaking" as the basis for its new rights. However, in Germany, historically, "establishment" has been used as the basis for Works Councils and therefore for the information and consultation of employees.

This ability to apply different terms and definitions means that although information and consultation issues will now be widespread across Europe there will still be substantial differences between countries.

The Draft Directive on Cross-Border Mergers

1. Objective

On 18th November 2003 the European Commission published a proposal for a Company Law Directive on Cross-Border Mergers. The proposed Directive seeks to facilitate cross-border mergers of companies with share capital within the EU. It is aimed primarily at small and medium-sized companies that are not interested in forming a European Company (*Societas Europaea*)[1], although larger companies are not excluded from participating in a cross-border merger governed by this Directive.

2. Background

A possible Cross-Border Mergers Directive has been under consideration for about 20 years. A previous version of a Directive on cross-border mergers was published in 1984, but withdrawn in 2001 when agreement could not be reached on provisions for employee participation rights. The proposed Directive is the first measure under the Commission's Action Plan on Company Law and Corporate Governance. It is part of the Lisbon Agenda to make the EU "the most competitive and dynamic knowledge-based economy in the world" by 2010.

3. Scope

The Directive will apply to both public and private companies with share capital. 'Companies with share capital' may be defined as companies having a legal personality and separate assets which cover the company's debts. The Directive will apply to any merger (whether done by way of the acquisition of one company by another or by the creation of a new company) between two or more EU companies provided at least two of them are governed by the laws of different Member States. Corporate restructuring through use of the merger procedure under the Directive will be optional.

4. Applicable law

The basic principle underlying the cross-border merger procedure is that, subject to certain exceptions, each company will remain subject to its national law on domestic mergers. These include provisions regarding the protection of employees except of employee participation rights, which are governed by Article 14 of the Directive.

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[1] See Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) entering into force on 8th October 2004

5. Employees protection rights

In principle the cross-border merger remains subject to the relevant provisions applicable in the Member States (as mentioned above). There is an exception for employee participation rights where special rules can apply.

A common framework within the EU, providing a minimum standard of employees' rights is set out in some European Directives. These are

- The Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings;
- The Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees; and
- The Council Directive 94/45/EC of 22 September 1994 and the Council Directive 97/74/EC of 15 December 1997, both of which concern the establishment of a European works council and the informing and consulting of employees.

By virtue of these provisions, the change of employer resulting from the merger operation must have no effect on the contract of employment or employment relationship in force at the time of the merger, which is automatically transferred to the new owner. Also protected after the merger are all acquired rights of employees agreed under a collective agreement, and their rights to old-age, invalidity or survivor's benefits under statutory social security schemes.

6. Draft terms of cross-border merger

The merging companies must draw up common draft terms for the cross-border merger. The only employment related point that has to be included in the common draft terms of cross-border merger is information on the arrangements for employee involvement in decisions taken by the company created by the merger.

There are no further obligations to include information about other employment issues in the draft terms of cross-border merger, e.g. about the consequences of the cross-border merger to the employees.

7. Employee information and consultation

The Directive does not contain employee information and consultation provisions. They are adequately addressed at national and transnational level by existing employment legislation (particularly the Information and Consultation Directive and the European Works Council Directive).

8. Employee participation rights

Article 14 of the Draft Directive deals with the participation of employees in the company created by a cross-border merger. The provisions will have a significant effect on companies' considerations to merge with companies in other European countries having participation schemes.

- *What does employee participation mean?*

Employee participation is essentially a system that exists in some Member States and gives employees the statutory right to involvement at board level. The existing employee participation systems in the Member States vary widely. Without considering the 10 new Member States, only Belgium, Italy, Spain, Portugal and the UK have no general legislation or widely applicable collective agreements providing for board-level representation in at least some types of company. In Greece and Ireland there exists legislation on employee participation only in the public sector. Relatively comprehensive legistlation on board-level representation can be found in Austria, Denmark, France, Finland, Germany, Luxembourg, the Netherlands and Sweden.

- *Provisions and its impact on cross-border mergers*

  - The Directive does not impose any new participation requirements where employee participation rights do not exist in any of the merging companies.

  - Where a merged company registers in a Member State that imposes compulsory participation rules, those rules would apply throughout the new company. In this case it is irrelevant whether, and if so, which participation regimes applied in any of the merging companies before the merger.

Example: Where a UK company merges with a German company and incorporates in Germany, the German rules on employee participation would apply to the entire company.

  - Where participation arrangements exist in one or more of the merging companies (compulsory or voluntary) but the law of the Member State where the company created by merger is to be incorporated does not impose compulsory employee participation an appropriate regime for employee participation has to be negotiated.

Example: Where a German company merges with a UK company and incorporates in the UK, a negotiation process with employee representatives is required to agree the employee participation arrangements that will exist in the entire company.

For this purpose, Article 14 incorporates by reference the negotiation procedure of Directive 2001/86/EC, concerning the European Company Statute (ECS). The details are complex.

(a) The negotiation process requires the setting up of a Special Negotiating Body (SNB), representing all the employees of all the merging companies.

(b) All decisions of the SNB must be taken by an absolute majority of the SNB members, representing an absolute majority of the employees.

(c) The negotiating process to agree the employee participation arrangements with the employee representatives can take up to 12 months.

(d) In all cases, the highest "level" of employee participation rights must be maintained and extended across the merged company as had previously existed in any of the merging companies, unless the SNB decides otherwise.

(e) However, where at least 25% of the overall numbers of employees have participation rights, a special two-thirds majority decision of the SNB is required for any reduction in the level of participation rights.

(f) Where no negotiated solution is reached, the participation regime which best protects the acquired rights of the employees and which already exists in one of the merging companies would be extended to the entire company created by the merger, provided either at least 25% of the total number of employees were covered by a form of employee participation before the merger or the SNB so decides ("standard rules").

Example: Where a German company merges with a UK company and incorporates in the UK, the German rules would automatically apply for the entire company if the negotiation process fails and at least 25% of the total number of employees were covered by German employee participation before the merger. The German rules would also apply, if less than 25% of the total number of employees were covered by German employee participation, but the SNB decided to apply the German participation system to the merged company.

The Member States have the option of not applying the standard rules in these cases. However, use of this option would mean that the merged company is not able to register in that Member State.[2]

9. Effects of Directive

- *Disproportionate impact*

The process of negotiating participation arrangements would apply only where a merged company, which previously had some participation, wishes to register in a Member State (like the UK) that does not impose compulsory participation rules. The effects would be that the highest level of participation that existed in the merging company would, in most cases, be extended to all employees in the new company.

- *Reduced choice and flexibility for companies*

The current provisions in Article 14 for harmonising different employee participation arrangements within the merging companies may artificially distort merger decisions if, when seeking out suitable merger opportunities, companies look for partners with comparable participation regimes (to avoid the need for negotiations) or no participation rights at all.

- *Complex negotiation procedure*

These provisions are complex and the duration of the negotiation process that is required before a merger can be completed could deter companies from opting for a cross-border merger.

[2] See Article 12(3) Council Regulation (EC) No 2157/2001 of 8 October 2001

- *Export of employee participation*

With the Directive the European Commission aimed to retain the Member States' existing employee participation rights, but the result by far exceeds this objective. For employee participation is not only retained; it is exported to countries that do not have such a system of employee participation. In practice, this means that certain companies will be unable to merge, or face severe disadvantages as opposed to other companies. It seems improbable that a British company considering a merger with a German company will accept the fact that half of it's one-tier board is filled with employee representatives. And even if this were acceptable, the merged company would run the danger of having to implement a continuous stream of legal amendments that apply to a different Member State where employee participation is based on the "standard rules".

- *Incompatibility with EU freedom of establishment*

It seems incompatible with the freedom of establishment if, as a consequence of a merger process, the employee representatives from one EU country can significantly codetermine the corporate policy and strategy in other countries, whose traditions do not know any kind of employee participation.

- *Obstruction to free movement of capital and companies within the EU*

The provisions under Article 14 of the Directive are not used to facilitate, but to obstruct the free movement of capital and companies within the EU. As stated above, for example, it is unlikely that a UK company considering a merger with a German company will accept the fact that half of its one-tier board is filled with employee representatives. In this case it would be more likely that the UK registered company would seek another merging possibility. In this way companies from Member States with employee participation schemes could be discriminated against.

- *Multiplication of negative consequences*

The unequal treatment of companies in different Member States multiplies the negative consequences and faults in extensive employee participation systems. For example employers and employers associations in Germany regard the existing employee participation system as a significant locational disadvantage. The "export" of extensive employee participation systems can make employee participation an investment barrier.

- *Contrast to current trends in corporate governance*

An important element of modern corporate governance is the implementation of increasingly harmonised international standards to promote the efficient supervision of companies, such as calling for the independence of the members of the supervisory board supervising the company management. As members of the supervisory board, the employee representatives do not fulfil these conditions as they are employees.

Cross-Border Application of the Acquired Rights Directive

The stated aim of the Acquired Rights Directive (the ARD) is "the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses". However, it does not directly deal with the situation where an undertaking or business transfers to another jurisdiction. Indeed, the ARD draws no express distinction between cross-border and purely national transfers. Consequently, the law in relation to employees' rights in this area is left in something of a vacuum. It is fair to say that when the ARD was originally introduced in 1977, cross-border transfers were relatively rare in practice, in contrast to today. However, the lack of case law dealing specifically with cross-border transfers makes commercial and legal planning in this area problematic.

Article 1 (2) of the ARD applies "where and insofar as the undertaking (….) to be transferred is situated within the territorial scope of the (EC) Treaty". Although this seems to limit the scope of the ARD to undertakings already situated in Member States, it also implies that a "transnational" transfer may be within the scope of the Directive. However, a "transnational" transfer, where a place of work changes from one Member State to another (or to a non-Member State) as a result of the transfer, is not mentioned in any of the operative provisions of the ARD.

Article 2 of the ARD defines an 'employee' as "any person who, in the Member State concerned, is protected as an employee under national employment law". In many countries, there may be a debate as to who qualifies as an 'employee' and therefore who has protected employment status. In other countries, this distinction may not exist.

Article 3 of the ARD gives Member States the flexibility to decide whether there should be joint and several liability between transferors and transferees of businesses and undertakings in relation to obligations arising before the date of transfer: "Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of transfer". The practical difficulties in applying the ARD in a cross-border context where some countries will have adopted the principle of joint and several liability and others will pass all obligations on to the transferee alone leads one to reach the conclusion that there was no intention for the liabilities in connection with business transfers to pass across national borders.

The European Commission had originally planned that the ARD would have cross-border effect. The 1974 Commission proposal for the ARD contained a provision on the conflict of laws, drafted as follows:

1. The labour law of Member States which are applicable to employment relationships prior to the merger or takeover shall also apply after the merger or takeover has taken place.

2. Paragraph 1 shall not apply where the place of work of the employee is transferred in a valid manner to another Member State or where the application of another body of labour law is concluded with the employee in a valid manner.[3]

However, this provision was dropped from the final text of the ARD because this issue was to be dealt with by an EU regulation on conflicts of laws in employment matters (which was never actually adopted). Impracticability and political difficulties may have contributed to this provision being withdrawn. For example, taking one matter alone, how would it be possible to transfer collective agreements?

The ARD does not, of course, just apply to the mainland United Kingdom (where there are obvious geographical barriers to cross-border transfers given its island status), but also to continental Europe, where businesses can more easily migrate across national land borders. It may be very simple for Belgian employees, for example, to travel 30 miles to work from within Belgium to a place of work just over the border in France following a cross-border transfer of the business in relation to which they are employed. However, there would be an entirely different social security and legal working environment that greeted them. They would be performing their employment in France, rather than in Belgium, and French law would apply. There would be other practical difficulties, such as the difference in working weeks.

In practice, employees are unlikely to want to transfer across national borders. As such, it makes sense for the ARD not to apply on a cross-border basis. However, it does leave open the question of what happens to those employees who are employed in relation to a business that transfers out of the jurisdiction in which it currently operates. The ARD is a Europe-wide measure intended to improve the rights of employees, not to reduce them. There would be a real issue with regard to enforcement of rights were the ARD to be held to have cross-border application to the extent that an employee affected by a business transfer could only preserve his employment rights by being prepared to work overseas on the same terms and conditions.

(source Fernando Pereira DG Employment and Social Affairs, Unit D3-Labour Law and work organisation, November 2002)

Cross-Border Transfers and Redundancies

The CMS Employment and Pensions Group book, Cross-Border Transfers and Redundancies, is to be published by Lexis Nexis in October.

The first section of the book contains chapters of general interest on the key EU Directives applicable to cross-border transfers and redundancies. These cover the Acquired Rights Directive, the Collective Redundancies Directive and the Information and Consultation Directive. There is also a chapter in this section dedicated to Jurisdiction and Conflicts of Laws issues. The second section of the book sets out the text of the relevant Directives.

The application of the laws of different Member States across national borders can be a difficult matter, both technically and in practice. In order to demonstrate how the laws of different Member States operate in practice and the extent to which they have application across national borders, the third section of the book consists of case studies.

Case Study 1 deals with the acquisition by a company situated in one EU country of a "business" situated in another EU country. The purpose of this case study is to show how the laws of different EU countries deal with the acquisition of a "business" outside their own country by a company based inside their country, where that "business" will remain in another EU country.

Case Study 2 deals with the situation where a parent company decides to close down part of the business of one of its subsidiaries (based in one EU country) and transfer this to another subsidiary (based in another EU country). The purpose of this case study is to show how the laws of different EU countries deal with the transfer of a "business" from their own country to another EU country, including a physical move.

Case Study 3 deals with the outsourcing of an ancillary activity of a business from an EU country to a non-EU country. The purpose of this case study is to show how the extent to which (and how) different national laws operate outside the EU.

Each case study is based on a common fact scenario that outlines the core information on which each set of responses is based. This section sets out this information and the questions to which the contributors from each CMS office were required to respond.

The final section of the book comprises a country-by-country guide in relation to cross-border transfers and redundancies. That is a summary of the law in each country in relation to these issues and responses to the case studies from the point of view of the law and custom and practice in those countries. There are 10 chapters in this section, covering the position in Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Spain, Switzerland and the United Kingdom. Each chapter has a common format so that readers can compare and contrast the laws and practices of the different countries easily.

If you would like further information about this book please contact your usual contact on employment law issues.

Other key EU laws in the news:

The Equal Treatment Framework Directive (2000/78) places all Member States under an obligation to introduce legislation outlawing discrimination based on religion, belief, disability, age and sexual orientation discrimination. Most of the provisions should have been implemented in national law by 2 December 2003. However Austria, Belgium, Germany, Finland, Greece and Luxembourg are the subject of legal action by the European Commission for failing to transpose the Directive fully. Member States have until 2 December 2006 to implement the provisions on age and disability discrimination.

The EU Commissioner for Social Affairs is set to bring key aspects of the Working Time Directive (1993/104) up to date. This is likely to include clarification to what extent on-call by health professionals should be counted as working time, a review of the individual opt-out from the 48-hour week and an extension of the period over which the 48 hour weekly average is calculated. Proposed reforms are to be presented in September

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