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Turkey: Dominance

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Overview

In Turkey, unilateral conduct of a dominant undertaking is restricted by article 6 of the Law on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings, individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited.' Although article 6 does not define what constitutes 'abuse' per se, it provides five examples of forbidden abusive behaviour, which comes as a non-exhaustive list and falls to some extent in line with article 102 of the Treaty on the Functioning of the European Union (TFEU). Accordingly, these examples include the following:

- directly or indirectly preventing entries into the market or hindering competitor activity in the market;
- directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
- making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;
- distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and
- limiting production, markets or technical development to the prejudice of consumers.

Pursuant to article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the article 6 prohibition applies only to dominant undertakings, and in similar fashion to article 102 of the TFEU. Dominance itself is not prohibited, but only the abuse of dominance is outlawed. Further, article 6 does not penalise an undertaking that has captured a dominant share of market because of superior performance.

Dominance provisions, as well as other provisions of Law No. 4054, apply to all companies and individuals to the extent that they qualify as an undertaking, which is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Notably, state-owned entities also fall within the scope of the application of article 6.

Dominance

The definition of dominance could be found in article 3 of Law No. 4054, which states it as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers'. Enforcement trends show that the Turkish Competition Board (the Competition Board) is increasingly inclined to broaden the scope of application of the article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases where clear dependence or interdependence to either competitors or customers exist (see, for example, the *Board's Coal Enterprise* No. 04-76/1086-271, 1 December 2004, and *Warner Bros* No. 05-18/ 224-66, 24 March 2005).

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in article 6. For establishing a dominant position, the relevant market must first be defined and then the market position must be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of market definition. Thus the undertakings concerned must be in a dominant position in relevant markets that are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary step for evaluating its position in the market. In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.

In assessing dominance, although the Competition Board considers high market shares as the most indicative factor of dominance, the Competition Board also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of an incumbent firm). Thus, domination of a given market cannot solely be defined on the basis of the market share held by an undertaking or of other quantitative elements, but other market conditions as well as the overall structure of the relevant market should be assessed in detail.

Collective dominance

Collective dominance is also covered by Law No. 4054, as indicated in the aforementioned definition provided in article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance (see, for example, *Turkcell/Telsim* No. 03-40/432-186, 9 June 2003).

Dominance under merger control rules

Structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions) are regulated by the merger control rules established under article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for the enforcement under the Turkish merger control rules, but rather 'a restriction of effective competition' element is required

to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can be applied also to cases involving the abuse of dominance.

On a separate note, mergers and acquisition are normally caught by the merger control rules contained in article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms use joint venture agreements as a back-up tool to exclude competitors which is prohibited under article 6 (see, for example, *Biryay*, No. 00-26/292-162, 17 July 2000).

Abuse

As mentioned above, the definition of abuse is not provided under article 6 of Law No. 4054. It only contains a non-exhaustive list of certain forms of abuse. Moreover, article 2 of Law No. 4054 adopts an effects-based approach for identifying anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in demonstrating the existence of dominance. Furthermore, abusive conduct on a market that is different to the market subject to dominant position is also prohibited under article 6. The Board found incumbent undertakings to have infringed article 6 by engaging in abusive conduct in markets that are neighbouring to the dominated market (see, for example, *Türk Telekom*, No. 02-60/755-305, 2 October 2002, and *Turkcell* decision, No. 01-35/347-95, 20 July 2001).

Specific forms of abuse

Under Turkish competition law, specific forms of abuse are apparent. First off, price and non-price competition may amount to an abusive conduct under article 6. The Competition Board has in the past found incumbent undertakings to have infringed article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions (see, for example, *TTAS*, No. 02-60/755-305, 2 October 2002, and *Türk Telekom/TTNet*, No. 08-65/1055-411, 19 November 2008).

As mentioned above, both exploitative and exclusionary abuses fall within the prohibitions provided under article 6. On the other hand, exploitative prices or terms of supply may be deemed an infringement, although the wording of the provision does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms in the past. However, complaints filed on this basis are frequently dismissed because of the Competition Authority's reluctance to micromanage pricing behaviour.

Although article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. In particular, the Competition Board, in *Turkcell* (No. 09-60/1490-37, 23 December 2009), condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with the competitors. In addition to that, in *Dogan Holding* (No. 11-18/341-10, 30 March 2011), the Competition Board condemned Doğan Yayın Holding, the biggest undertaking in the media sector in Turkey, for abusing its dominance position in the market for advertisement spaces in the daily newspapers by applying loyalty inducing rebate schemes.

Predatory pricing may be regarded as a form of abuse, although the Competition Board has never condemned an undertaking on the basis of predatory pricing (apart from in *Turk Telekom*, which concerns margin squeeze rather than straight forward predatory pricing), as evidenced by many precedents. The Competition Board is considerably familiar with the the elements of predatory pricing (see, for example, *Trakya Cam*, No. 11-57/1477-533, 17 November 2011; *Denizcilik Isletmeleri*, No. 06-74/959-278, 12 October 2006; and *Feniks*, 23 August 2007).

On the other hand, as mentioned above, due to the Competition Board's reluctance to micromanage pricing behaviours, complaints on the basis of predatory pricing are frequently dismissed. It has been observed that high standards are set for bringing forward predatory pricing claims.

In line with EU jurisprudence, price squeezes may amount to a type of abuse in Turkey. The Competition Board is known to closely scrutinise allegations of price squeezing, and recent precedents (see, for example, *Turk Telekom/TT Net*, No. 08-65/1055-411, 19 November 2008) involved an imposition of monetary fines on the basis of this form of abuse.

Exploitative prices or terms of supply may be deemed an infringement of article 6, although the wording of the law does not contain a specific reference to this concept. The Board condemned excessive or exploitative pricing (see, for example, *Belko*, No. 01-17/150-39, 6 April 2001) by dominant firms in the past.

Refusals to deal and access to essential facilities are forms of abuses that are frequently brought before the Competition Authority. Therefore, there are various decisions (see, for example, *POAS*, No. 01-56/554-130, 20 November 2001; *Eti Holding*, No. 00-50/533-295, 21 December 2000; *AK-Kim*, No. 03-76/925-389, 12 April 2003; and *Çukurova Elektrik*, No. 03-72/874-373, 10 November 2003) of the Competition Board on this matter.

Although exclusive dealing, non-compete provisions and single branding normally fall under the scope of article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of article 6. On that note, the recently revised version of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is now an unlikely candidate to engage in non-compete provisions and single branding arrangements.

Tying and leveraging are among the specific forms of abuse listed in article 6. The enforcement track record indicates no cases where the incumbent firms were fined as a result of tying or leveraging. On the other hand, the Competition Board ordered some behavioural remedies against incumbent telephone and internet operators in some recent cases, in order to have them avoid tying and leveraging (see *TTNET-ADSL*, No. 09-07/127-38, 18 February 2009).

Although limiting output, markets or technical development is one of the specific forms of abuse listed in article 6, according to the enforcement track record, there has not been any case where the incumbent firms were found to infringe article 6 as a result of limiting output, markets or technical development. Furthermore, despite the fact that the issue of intellectual property rights is even more important than ever before, the precedents of the Board do not yet include a finding of an infringement on the basis of abuse of intellectual property rights since this issue has not been brought before the Turkish Competition Authority.

As mentioned above, the list of specific abuses present in article 6 is not exhaustive and it is very likely that other types of conduct may be deemed as abuse of dominance by the Competition Board. On the other hand, it is worth mentioning that the enforcement track shows the Competition Board has not been in a position to review any allegation of other forms of abuse, such as strategic capacity construction, predatory product design or product innovation, failure to predisclose new technology, predatory advertising or excessive product differentiation.

Sector-specific abuse

Since Law No. 4054 does not recognise any industry-specific abuses or defences, certain sectoral independent authorities have competence to control dominance in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market are prohibited from engaging in discriminatory behaviour between companies seeking access to their network and, unless justified, from rejecting requests for access, interconnection or facility-sharing. Similar restrictions and requirement are also regulated for the energy sector. Therefore, although the sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market, the Competition Authority is the only regulatory body that investigates and condemns abuses of dominance.

Enforcement

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. The Competition Authority consists of the Board, presidency and service departments. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning abuses of dominance. The Competition Board has seven members and is seated in Ankara. The service departments consist of five main units. There is a 'sectoral' job definition of each main unit.

The Competition Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information or failure to produce on a timely manner may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can examine the books, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore grants the Competition Authority with vast authority to conduct dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. While the mere wording of the law allows oral testimony to be compelled of employees, case-handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them provided a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (ie, copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (ie, that which is written on the deed of authorisation). Refusing to grant the staff of the Competition Authority access to business premises may lead to the imposition of fines.

The minimum amount of fine set for 2012 is 13,591 Turkish lira. It may also lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

Sanctions and remedies

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of fine imposed on the undertaking or association of the undertaking. Law No. 4054 makes reference to article 17 of the Law on Minor Offences and there is also a Regulation on Fines. Accordingly, when calculating the fines, the Competition Board takes into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments and so on, in determining the magnitude of the monetary fine.

Private enforcement

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies; that is, to require that undertakings follow a certain method of conduct such as granting access, supplying goods or services or concluding a contract. Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead it to initiate an investigation, which may or may not result in finding of infringement. The legislation does not explicitly empower the Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

Availability of damages

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits.

Articles 57 et seq of Law No. 4054 entitle any person who is injured in his business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple-damages clause exists in the law. In private suits, the incumbent firms are adjudicated before regular courts. Because the triple-damages clause allows litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the article 6 enforcement arena. Most courts wait for the decision of the Competition Board and build their own decision on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

Recent enforcement action

The recent enforcement trend of the Turkish Competition Authority showed that it has becoming more and more interested in pricing behaviours of the dominant undertakings, since over the past two years there has been several pre-investigations and investigations launched by the Turkish Competition Authority in relation to this aspect of the competition law principles in Turkey, such as the *Turkish Airlines/Pegasus* (30 December 2011, No. 11-65/1692-599) and *Turkcell* (24 November 2011, No. 11-59/1516-541) investigations, and the *Efes Pazarlama* (18 July 2012, No. 12-38/1085-344), *IDO* (01 November 2012, No. 01.11.2012) and *DHMI* (24 April 2012, No. 12-21/561-159) pre-investigations.

The following cases are the most recent landmark decisions regarding abuse of dominance, which were issued by the Turkish Competition Board in 2012.

UND Deniz/UN Ro-Ro (10 January 2012, No. 12-47/1412-474)[1]

The Competition Board initiated an investigation against Un Ro Ro İşletmeleri AŞ (UN Ro Ro), on 10 March 2010 based on the complaint of UND Deniz Taşımacılığı AŞ (UND Deniz) which had been the subject of exclusionary activities by Un Ro Ro. Both undertakings were engaged in maritime transportation via roll-on-roll-off (ro ro) ships which are designed to carry wheeled cargo such as automobiles, trucks, semi-trailer trucks, trailers and railroad cars that are driven on and off the ship on their own wheels. The short-form decision regarding the investigation was rendered in the Competition Board's meeting dated 1 October 2012, No. 12-47/1412-474. The short form decision set forth the following conclusions:

- UN Ro Ro was in a dominant position in the market for maritime transportation via ro ro vessels between Turkey and Europe;
- UN Ro Ro's refusal to accept UND Deniz's taking part in the ticket recognition and service system established by UN Ro Ro and Ulusoy Ro Ro İşletmeleri AŞ did not constitute a violation article 4 of Law No. 4054 or an abuse of a dominant position under article 6 of Law No. 4054;
- however, UN Ro Ro caused the exclusion of a rival through predatory pricing and also impeded the commercial activities of its rival through other means; and
- therefore, UN Ro Ro was fined in the amount of 4 per cent of its 2011 turnover which corresponded to 841,200 Turkish lira.

The following points were argued by ELIG in favor of the complainant, UND Deniz:

- UN Ro Ro was in a dominant position in the market for ro ro trasportation between Turkey and Europe as recognised by previous decisions of the Competition Board;
- the combination of prices and promotions used by UN Ro Ro amounted to pricing below average avoidable cost, which should by itself demonstrate anti-competitive intent and predatory pricing in the case of an undertaking that is already in a dominant position in the market;
- on top of its dominant position, UN Ro Ro also enjoyed great financial superiority over UND Deniz as UN Ro Ro was owned by a leading global investment company;
- faced with UN Ro Ro's exclusionary activities, UND Deniz was forced to abandon the Tekirdağ–Toulon line on 23 November 2010 and cease its operations altogether on 23 October 2010; and
- in response to UND Deniz's exit from the market, UN Ro Ro immediately increased its prices by 6 per cent and ceased some of its promotions which alone are estimated to have resulted in recoupment of €19 million, thereby demonstrating the element of recoupment.

As the reasoned decision of the Competition Board has yet to be released, it is not possible to fully anticipate the elements relied upon by the Competition Board to justify its decision. However, it would not be assertive to say that the decision is a good demonstration of the fact that the Competition Board is likely to continue paying close attention to the pricing behaviours of and possible exclusionary activities by dominant undertakings.

Kale Kilit (6 December 2012, No. 12-62/1633-598)

The Competition Board initiated an investigation against Kale Kilit ve Kalıp Sanayi AŞ (Kale Kilit) on 17 August 2012 based on the complaint that Kale Kilit, a player in the locker systems sector in Turkey, abuses its dominant position by imposing single branding obligations on its dealers and distributors, and also applied predatory pricing through certain promotional campaigns. The Turkish Competition Board rendered its decision regarding the investigation through its meeting of 6 December 2012, No. 12-62/1633-598. The reasoned decision made the following conclusions:

- upon the examination of Kale Kilit costs for each of its products group (constituting separate relevant product markets), Kale Kilit prices had been always above its average costs and thus the main element for the determination of predatory pricing has not been satisfied;
- no evidence has been found that could demonstrate Kale Kilit's exclusionary intent towards its competitors and thus 'intent' element has not been satisfied either for the case at hand;
- no evidence has been found during the on-site inspections conducted at Kale Kilit and its dealers that could show that Kale Kilit imposed single branding obligations on its dealers and distributors; and
- as no competition law infringement has been detected, there is no need to conduct an analysis as to whether Kale Kilit enjoys dominant position or not.

Notes

1 ELIG acted on behalf UND Deniz in the investigation. For this reason, this chapter comprises the evaluations of the allegations and defences that ELIG is directly acquainted with, and aims to delineate the central issues that culminated in the final decision, without breaching any obligation that may arise as a result of confidentiality in respect of the investigation. Evaluations set out herein do not include or constitute any expression, finding, inference or evaluation on the Competition Board's reasoned decision regarding the investigation, nor can it be construed to include as such.

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Gönenç Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak holds an LLM degree from Harvard Law School, and he is qualified in Istanbul, New York and England & Wales (currently a non-practising Solicitor). Mr Gürkaynak heads the competition law and regulatory department of ELIG, which currently consists of 13 associates. He has unparalleled experience in Turkish competition law counseling issues with over 13 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 10 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court, and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics. Prior to joining ELIG as a partner more than eight years ago, he worked at the Istanbul, New York and Brussels offices of White & Case LLP for more than eight years. Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He teaches undergraduate and graduate level courses at three universities, and gives lectures in other universities in Turkey.

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M Hakan Özgökçen holds an LLB degree from Marmara University Law School (2003) and an LLM degree from Istanbul Bilgi University (2010). He is qualified to practice in Istanbul. Mr Özgökçen is a senior associate at the competition law and regulatory department of ELIG. He has been assisting Gönenç Gürkaynak with a vast number of complex matters of Turkish competition law counselling, and also in numerous other fields of Turkish law for more than four years. Mr Özgökçen has also published a number of articles in collaboration with Mr Gürkaynak.

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ELIG aims to provide its clients with high-quality legal service in an efficient and business-minded manner. All members of the ELIG team are very fluent in English. ELIG represents corporations, business associations, investment banks, partnerships and individuals in a wide variety of competition law matters. The firm also collaborates with many international law firms on Turkish competition law matters.

In addition to an unparalleled experience in merger control issues, ELIG has vast experience in defending companies before the Competition Board in all phases of an antitrust investigation. We have in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all other forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to a significant antitrust litigation expertise, our firm has considerable expertise in administrative law, and is therefore well equipped to represent clients before the High State Council, both on the merits of a case and for injunctive relief. ELIG also advises clients on a day-to-day basis concerning business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing.

In 2012, ELIG was involved in more than 45 clearances of merger notifications, more than 17 defence projects in investigations, and over eight appeals at the High State Council; together with approximately 37 antitrust education seminars provided to the employees of clients.


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