FEDERAL CONSTITUTIONAL COURT

– 1 BvR 99/11 – Vz 1/15 –

In the proceedings
on
the complaint against judicial delay

(*Verzoegerungsbeschwerde*)

of Mr Sch(…),

against the duration of the constitutional complaint proceedings in the case of 1 BvR 99/11

the Complaints Chamber of the Federal Constitutional Court

with the participation of Justices

Landau,

Schluckebier,

Paulus,

Maidowski

held on 8 December 2015:

The complaint against judicial delay is rejected as unfounded.

Reasons:

I.

The complaint against judicial delay is directed against the duration of the proceedings regarding a particular constitutional complaint. 1

1. In the initial proceedings, the complainant sought to have his personal data deleted from the public prosecutor's register of proceedings; moreover, he objected to the release of a criminal file about him to the Archives of the *Land* North Rhine-Westphalia. 2

The complainant filed an application for the Higher Regional Court (*Oberlandesgericht*) to rule against the public prosecutor's rejection of his requests; that application was rejected as unfounded in the last instance. The Higher Regional Court held that beyond a partial deletion that had already taken place, the complainant had no entitlement to the removal of any further personal data (concerning the nature of the offence, dates of the offence, nature of the decision and date case closed) that remained in the public prosecutor's register of proceedings, *inter alia* for reasons of practicality because of the particular manner in which the data were stored, which for 3

systemic reasons made it impossible for these files to be deleted individually. A complaint of violation of the right to a hearing in court (*Anhoerungsruege*) against this decision was unsuccessful.

2. The complainant lodged a constitutional complaint on 4 October 2010 against the public prosecutor's decision and the decisions of the Higher Regional Court. That complaint was first entered in the General Register (AR 7295/10) for the purpose of resolving the issue of jurisdiction. The complainant was notified of that entry in a letter dated 12 October 2010. 4

In a letter dated 20 January 2011, the Federal Constitutional Court notified the complainant, through his lawyers, that the constitutional complaint had now been entered in the register of proceedings as a constitutional complaint (1 BvR 99/11). 5

By a letter dated 1 February 2015, the complainant filed a formal objection to judicial delay (*Verzoegerungsruege*), together with a request for a prompt decision on the merits. The letter was received by the Federal Constitutional Court on 3 February 2015. 6

In an order of 13 May 2015, the relevant Chamber of the Federal Constitutional Court ruled against admitting the constitutional complaint for decision. In its reasons, the Chamber stated that the challenged decisions of the Higher Regional Court had remained within that court's leeway in assessing the facts and applying the law as a regular court. It is true, the Chamber allowed, that contrary to the view of the Higher Regional Court, the mere fact that IT-supported data processing does not provide, for systemic reasons, the option to delete certain data does not justify storage of a data record that is not otherwise necessary in order for an authority to perform its duties. In that regard, the Chamber argued, the requirements for technical data processing must comply with the requirements ensuing from the right to informational self-determination, and not vice versa. The Chamber concluded that ultimately, however, the further discussion by the Higher Regional Court showed no indication that the court had failed to recognise the significance of the fundamental right to informational self-determination. 7

3. On 7 September 2015, the complainant filed a formal complaint against judicial delay (*Verzoegerungsbeschwerde*). He asked the Court to declare that the proceedings on constitutional complaint 1 BvR 99/11 had been unreasonably long […]. He further claimed compensation […]. 8

[…] 9-15

4. a) The reporting Justice in the proceedings released [… a] statement under § 97d sec. 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) on 6 October 2015: 16

[…] 17-23

II.

The constitutional complaint is admissible but unfounded. 24

1. A party to proceedings before the Federal Constitutional Court who suffers a disadvantage due to unreasonable duration of the proceedings before the Federal Constitutional Court shall receive adequate compensation (§ 97a sec. 1 sentence 1 BVerfGG). Reasonable duration of proceedings shall be established on a case-by-case basis, taking into account the Federal Constitutional Court's tasks and position (§ 97a sec. 1 sentence 2 BVerfGG). The identification and assessment of the relevant circumstances for establishing a reasonable duration are to be based on the standards that the Federal Constitutional Court and the European Court of Human Rights have developed for assessing whether court proceedings are excessively long. However, when assessing the duration of proceedings before a constitutional court, it is particularly important to also take circumstances other than the mere order of registration into account, such as the nature of the case and its importance in political and social terms. Priority must be given to proceedings that are of particular importance to the common good. Taking into account a constitutional court's tasks and position, therefore, even a longer than usual duration of proceedings is not as such unreasonable; as a rule, exceptional and particular circumstances are needed to establish an unreasonable duration. 25

a) aa) According to the case-law of the Federal Constitutional Court, legal protection guaranteed by the Constitution can be effective, within the meaning of Art. 19 sec. 4 and Art. 2 sec. 1 of the Basic Law (*Grundgesetz* – GG) in conjunction with the rule of law under Art. 20 sec. 3 GG, only if that protection is granted within a reasonable period of time (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 55, 349 <369>; 60, 253 <269>; 93, 1 <13>). 26

However, the Basic Law does not specify any generally applicable time periods after which proceedings can be considered excessively long, obstructive to legal protection, and therefore unreasonable; rather, this is a matter that must be assessed case by case (cf. BVerfGE 55, 349 <369>; Federal Constitutional Court, Order of the Third Chamber of the First Senate of 20 September 2007 – 1 BvR 775/05 –, Neue Juristische Wochenschrift – NJW 2008, p. 503; Order of the Third Chamber of the First Senate of 14 December 2010 – 1 BvR 404/10 –, juris, para. 11). In particular, this consideration must take account of the nature of the case, its importance, and the impact of lengthy proceedings on the parties, the complexity of the matter, the conduct attributable to the parties – particularly any procedural delays for which they are responsible – and the activities of third parties over whom the court has only limited influence, especially expert witnesses (cf. Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 – Vz 11/14 –, NJW 2015, pp. 3361 <3362 para. 29>). By contrast, the state cannot invoke circumstances that fall within its own sphere of responsibility (cf. Federal Constitutional Court, Order of the Third Chamber of the First Senate of 14 October 2003 – 1 BvR 901/03 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2004, p. 334 <335>; Order of the Second Chamber of the First 27

Senate of 24 September 2009 – 1 BvR 1304/09 –, Neue Zeitschrift für Sozialrecht – NZS 2010, p. 381 <382>; Order of the Third Chamber of the First Senate of 14 December 2010 – 1 BvR 404/10 –, juris, para. 11). Furthermore, the courts must also take the overall duration of the proceedings into account, and, with increasing length, they must make substantial efforts to expedite the proceedings (cf. Federal Constitutional Court, Order of the First Chamber of the First Senate of 20 July 2000 – 1 BvR 352/00 –, NJW 2001, p. 214 <215>; Order of the Second Chamber of the First Senate of 24 September 2009 – 1 BvR 1304/09 –, NZS 2010, pp. 381 <382>; Order of the First Chamber of the First Senate of 20 July 2000 – 1 BvR 352/00 –, NJW 2001, p. 214 <215>; Order of the Second Chamber of the First Senate of 7 June 2011 – 1 BvR 194/11 –, Neue Zeitschrift für Verwaltungsrecht Rechtsprechungs-Report – NVwZ-RR 2011, p. 625 <626>).

bb) Comparably, according to the case-law of the European Court of Human Rights, Art. 6 sec. 1 of the European Convention on Human Rights (the “ECHR”) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can hear cases within a reasonable time (ECtHR, judgment of 27 July 2000, no. 33379/96, Klein v. Germany, para. 42, NJW 2001, p. 213). The reasonableness of the length of proceedings must be assessed in the light of the complexity of the case, the conduct of the applicant and the relevant authorities and courts and what was at stake for the applicant in the dispute (ECtHR, judgment of 2 September 2010, no. 46344/06, Rumpf v. Germany, para. 41, NJW 2010, p. 3355 <3356>; judgment of 21 October 2010, no. 43155/08, Grumann v. Germany, para. 26, NJW 2011, p. 1055 <1056>). 28

b) aa) These rules developed for proceedings in the regular courts also apply in principle to the Federal Constitutional Court, as a part of the judicial branch under Art. 92 GG (cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 20, 65 <71, 72 et seq.>; Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 – Vz 11/14 –, NJW 2015, p. 3361 <3363 para. 31>). However, in accordance with § 97a sec. 1 sentence 2 BVerfGG, they are modified by the Federal Constitutional Court’s tasks and position, and the resulting particular organisational and procedural circumstances (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 17/3802, p. 26). 29

In organisational terms, unlike the regular courts, without legislative action the Federal Constitutional Court is normally unable to expand its capacity in response to larger numbers of incoming cases in order to shorten the duration of proceedings, because the Court’s structure is determined by its function, and is prescribed by the Constitution and the Federal Constitutional Court Act (cf. BTDrucks 17/3802, p. 26). 30

Further particular procedural circumstances result from the task of authoritatively interpreting the Constitution (cf. § 31 BVerfGG), which generally requires a particularly thorough review that duly takes into account the interests to be balanced in each of 31

the Federal Constitutional Court's proceedings. This aspect sets limits on the ability to expedite proceedings as well (cf. BTDrucks 17/3802, p. 26).

Finally, the Federal Constitutional Court's role as the guardian of the Constitution may require the Court, in dealing with a case, to take more extensive account of circumstances other than the mere chronological order of entries in the court's register than a regular court – for example, because proceedings that are of particular importance to the common good must be given priority or because a decision is contingent on the decision in what are known as pilot proceedings (cf. BTDrucks 17/3802, p. 26; see also BVerfGK 19, 110 <121>; 20, 65 <73>; Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 – Vz 11/14 –, NJW 2015, p. 3361 <3363 para. 31>; ECtHR, judgment of 25 February 2000, no. 29357/95, Gast and Popp v. Germany, para. 75, NJW 2001, p. 211 <212>; judgment of 8 January 2004, no. 47169/99, Voggenreiter v. Germany, para. 49; judgment of 6 November 2008, no. 58911/00, Leela Förderkreis e.V. et al. v. Germany, para. 63, NVwZ 2010, p. 177 <178>; judgment of 4 September 2014, no. 68919/10, Peter v. Germany, para. 40, NJW 2015, p. 3359 <3360>). 32

The particular organisational and procedural circumstances of proceedings before the Federal Constitutional Court are taken into account under § 97b sec. 1 sentence 4 BVerfGG, according to which a formal objection to judicial delay cannot be filed until at least twelve months after the case has been received by the Federal Constitutional Court. The underlying idea is that, in any event, Federal Constitutional Court proceedings lasting one year are by no means to be considered unreasonable (cf. BTDrucks 17/3802, p. 27). 33

Even proceedings that take longer than usual are not unreasonably long for that reason alone; as a rule, exceptional and particular circumstances are needed to establish an unreasonable duration (cf. Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 – Vz 11/14 –, NJW 2015, pp. 3361 <3363 para. 35>). In drafting the Act on Legal Protection in Excessively Long Court Proceedings and Criminal Investigations (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren*) of 24 November 2011 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2302), the legislature was aware that on average, one third of the constitutional complaint proceedings between 2000 and 2009 averaged more than one year in duration, and about 7.4% of such proceedings averaged more than four years (cf. BTDrucks 17/3802, p. 27; Annual Statistics 2000 to 2009, e.g., 2009 Annual Statistics, p. 20); the legislature nevertheless refrained from setting forth any general rule as to when proceedings before the Federal Constitutional Court would be unreasonably long within the meaning of § 97a sec. 1 sentence 1 BVerfGG. Instead, the legislature focussed on the circumstances of the individual case, taking into account the special aspects that ensue from the Federal Constitutional Court's tasks and position (cf. BTDrucks 17/3802, p. 26). 34

bb) The European Court of Human Rights, in its case-law on Art. 6 sec. 1 of the 35

EHCR, acknowledges that the obligation to organise courts in such a way that they can decide cases within a reasonable time cannot be construed in the same way for a constitutional court as for a regular court.

It is true that according to this case-law, general backlogs caused by a chronic overload cannot justify an excessive length of proceedings even for the Federal Constitutional Court (ECtHR, judgment of 25 February 2000, no. 29357/95, Gast and Popp v. Germany, para. 78, NJW 2001, p. 211 <212>; judgment of 27 July 2000, no. 33379/96, Klein v. Germany, para. 29, 43, NJW 2001, p. 213 <213, 214>). However, the role of a constitutional court, as the guardian of the Constitution, requires that considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case, and its importance in political and social terms, must also be taken into account (ECtHR, judgment of 25 February 2000, no. 29357/95, Gast and Popp v. Germany, para. 75, NJW 2001, p. 211 <212>; judgment of 8 January 2004, no. 47169/99, Voggenreiter v. Germany, paras. 49, 52; judgment of 6 November 2008, no. 58911/00, Leela Förderkreis e.V. et al. v. Germany, para. 63, NVwZ 2010, p. 177 <178>; judgment of 22 January 2009, nos. 45749/06 and 51115/06, Kaemena and Thöneböhn v. Germany, para. 64, Der Strafverteidiger – StV 2009, p. 561 <562>; judgment of 4 September 2014, no. 68919/10, Peter v. Germany, para. 43, NJW 2015, p. 3359 <3360>). 36

2. By these standards, the duration of the complainant's constitutional complaint proceedings was not unreasonable. 37

From the time when the constitutional complaint was received in October 2010 until the order not admitting it for a decision was issued in June 2015, the proceedings to which the complainant objects took about four years and eight months. Thus, the proceedings did take unusually long (cf. BVerfGK 20, 65 <74>: similar assessment there of proceedings of about four and a half years, which was ultimately not found to be unreasonable; cf. ECtHR, judgment of 4 September 2014, no. 68919/10, Peter v. Germany, para. 47, NJW 2015, p. 3359 <3360>). However, taking into account the Federal Constitutional Court's tasks and position, that length was justified by factual reasons and therefore not unreasonable. 38

a) It is true that the complainant did not, through his conduct, contribute to the proceedings' duration at the Federal Constitutional Court. The mere fact that the complainant did not file his objection to judicial delay at an earlier date or did not ask the Court about the status of his case is no obstacle to concluding that the duration of proceedings was unreasonable. The duty of the state to guarantee legal protection within a reasonable time, which proceeds from Art. 2 sec. 1 in conjunction with Art. 20 sec. 3 GG (cf., e.g., BVerfGE 93, 1 <13> with further references), makes it imperative that courts take the overall duration of the proceedings into account and, with increasing length, they must make substantial efforts to expedite the proceedings, with no need for the parties or other persons involved to point this out. 39

Also according to the case-law of the European Court of Human Rights, the parties 40

to legal proceedings are not obliged to remind the relevant court of its duty, which stems directly from Art. 6 sec. 1 ECHR, to decide a case within a reasonable time (cf. ECtHR, judgment of 4 September 2014, no. 68919/10, Peter v. Germany, para. 43, NJW 2015, p. 3359 <3360>).

b) However, having regard to the Federal Constitutional Court's tasks and position, the duration of the constitutional complaint proceedings in the present case was still sufficiently justified by factual reasons that preclude the possibility of characterising the duration of the proceedings as unreasonable within the meaning of § 97a sec. 1 BVerfGG. This applies to the period until March 2015, during which the complainant's proceedings was deferred (aa), and for the duration of proceedings after the completion of the written opinion in the Senate's proceedings concerning the Federal Criminal Police Office Act (*Gesetz über das Bundeskriminalamt*), to which the reporting Justice had given priority (bb). 41

aa) (1) During the relevant period of time, an exceptionally large number of particularly extensive proceedings of great political importance were pending in the reporting Justice's Cabinet, to which the complainant's constitutional complaint was assigned on 19 January 2011 and which is, among other areas, competent for data protection law (on that point see (a)). The need to address these cases with priority justified the deferral of comparatively less extensive and less important proceedings like the complainant's (see (b)). 42

(a) The proceedings to which the Court gave priority were primarily Senate proceedings on data protection law that were already pending when the complainant's constitutional complaint was received. 43

In particular, these Senate proceedings concerned what is known as data retention (1 BvR 1299/05, BVerfGE 130, 151 – decided in January 2012), the Counter-Terrorism Database Act (*Antiterrordateigesetz*) (1 BvR 1215/07, BVerfGE 133, 277 – decided in April 2013), and the Federal Criminal Police Office Act (1 BvR 966/09 and 1 BvR 1140/09 – heard in July 2015). All these proceedings stood out for the unusual complexity of the provisions to be examined, as well as for their particular importance, from a legal policy perspective, concerning the relation between the protection of freedom as guaranteed by the fundamental rights, on the one hand, and the state's duty to ensure security in the context of the combat against national and international terrorism, on the other hand. 44

In this respect, the proceedings on the Federal Criminal Police Office Act, which was given priority over the complainant's proceedings and is still pending, and for which the drafting of the written opinion was completed in March 2015, was from a statutory and constitutional law perspective more complex than usual even for Senate proceedings. In addition, these proceedings were of heightened importance, from a legal policy perspective, because the new focus of the Federal Criminal Police Office on combating international terrorism was challenged as such, and thus an entire chapter (*Unterabschnitt*) of the Act and consequently a large number of new provisions autho- 45

rising the gathering of personal data.

Another Senate case of particular importance from a legal policy perspective – received in April 2011, given priority over the complainant's proceedings and decided in March 2014 – concerned the composition of the supervisory bodies for the public broadcasting corporations (the "ZDF Proceedings", 1 BvF 1/11 and 1 BvF 4/11, BVerfGE 136, 9). 46

(b) In addition, in the Chamber of the First Senate competent to decide the complainant's case, there were important proceedings that were given priority over his. These included, among others, proceedings on the obligation of the holder of an occupational disability insurance policy to release certain persons from their obligation of confidentiality when benefits are paid (1 BvR 3167/08 –, NJW 2013, p. 3086 – decided in July 2013), proceedings on the constitutionality of a biometric passport (1 BvR 502/09 –, juris – decided in December 2012) and proceedings on the use of the public prosecutor's investigation files from antitrust proceedings in civil proceedings against cartel participants (1 BvR 3541, 3543, 3600/13 –, NJW 2014, p. 1581 – decided in March 2014). Furthermore, there was one – comparatively older – case (1 BvR 1199/08) on data protection law concerning the surveillance of a person by the Federal Intelligence Service (*Bundesnachrichtendienst*) that was important and complex. 47

(c) There was no question of allocating these particularly extensive and especially difficult proceedings to other Justices of the Senate, as these Justices were also burdened with a heavy workload. 48

(2) Under these circumstances, the reporting Justice's decision to address these proceedings ahead of the complainant's proceedings was justified by factual reasons; the resulting delay in proceedings is therefore not unreasonable. 49

(a) A court's powers by which it organises the proceedings must be exercised with a view to the parties' fundamental rights, especially their right to effective legal protection. However, in order to ensure that the administration of constitutional law remains effective, the Court has considerable latitude in deciding which proceedings should be given priority, and according to which standards. As a rule, the limits of that latitude are exceeded only if the procedural measure cannot be based on objective reasons of procedural economy or other factual reasons that justify giving priority, but instead are based on extraneous considerations contrary to the purpose at hand, or seem disproportionate in view of the particular circumstances of the case (cf. BVerfGK 20, 65 <75> with further references; Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 ß – Vz 11/14 –, NJW 2015, p. 3361 <3364 and 3365 para. 44>). 50

(b) That was not the case here. 51

(aa) There is no indication that the reporting Justice's decision to defer the complainant's proceedings might have been based on extraneous considerations. There was no obstacle to the decision to defer the case, which was originally taken in Janu- 52

ary 2011 and was not doubted by the complainant, as the complainant's proceedings did not have specific importance in political or social terms exceeding that of the pending Senate proceedings. The same reasons applied with regard to the proceedings mentioned in the reporting Justice's statement and decided by the competent Chamber of the First Senate; moreover, these proceedings, with the exception of the ones decided in March 2014, had been received by the Court comparatively earlier than the complainant's proceedings.

(bb) According to the standards developed in the case-law, also during the period from the completion of the proceedings on data retention in January 2012 until March 2015 the Court was under no obligation to give the complainant's constitutional complaint priority, neither over the remaining – mostly older – politically and legally particularly important Senate proceedings, nor over all other proceedings pending in the Cabinet. 53

(α) The complainant believes that from the mere fact that his constitutional complaint was not admitted, he can conclude that the Chamber competent to decide his case did not have to deal with the merits of the case. He argues that for this reason, if his case had been handled properly, it could have been concluded within a year, especially because in statistical terms, a significantly shorter duration of proceedings in the Federal Constitutional Court is the rule. 54

This hypothesis is based upon the incorrect assumption that a case that is not admitted for decision is simple, therefore calls for no in-depth review of content, and can consequently be disposed of quickly. The complainant fails to realise that the mere refusal to admit a constitutional complaint is not per se a sound basis for such a conclusion. Moreover, in the instant case, the complainant's assumption is refuted by the fact that the order not to admit his proceedings stated reasons – a feature not required by law (cf. § 93d sec. 1 sentence 3 BVerfGG). For both Senates taken together, in 2014, the last year for which figures are available, reasons were stated in 217 proceedings, and therefore in 3.58% of the total of 6,062 constitutional complaint proceedings concluded by a Chamber's order of non-admission (cf. 2014 Annual Statistics, p. 18, at III. 1. a) aa)). Purely statistically, this sets the complainant's proceedings apart from the bulk of proceedings, irrespective of its outcome. Furthermore, the fact that the order of non-admission is reasoned demonstrates that contrary to the complainant's assumption, the Chamber competent to decide the case indeed discussed in depth the case and the legal issues it raised. 55

(β) Moreover, there was no indication that the constitutional complaint was of particular subjective importance, which would have been an obstacle to deferring it. According to the reporting Justice's statement – which has not been contested in this respect – the complainant most importantly seeks to have data deleted that are stored in the public prosecutor's register of proceedings, and – as is evident from the documents submitted to the Court – that are specifically protected against misuse. For example, employees of the public prosecutor's office who are not involved in archiving 56

these data cannot access them from their computers. The list of the records concerning the complainant also cannot be printed out at the public prosecutor's office. The purpose of this data storage is highly specific, and there is no indication that specifically these data will be accessed. The same also applies to the data transmitted to the *Land* archives; moreover, the use of these data is subject to special conditions.

In light of all the above, deferring the complainant's constitutional complaint until March 2015 was justified by factual reasons. 57

bb) As proved by the reporting Justice's statement, the reason for deferring the complainant's constitutional complaint ceased to exist after the written opinion in the proceedings concerning the Federal Criminal Police Office Act had been completed on 17 March 2015. 58

The subsequent period until the conclusion of the complainant's constitutional complaint proceedings on 13 May 2014 is also not unreasonable in light of the Court's obligation to compensate at least partially, by making substantial efforts to expedite the proceedings, for the time accumulated as the length of the proceedings increases (cf., e.g., Federal Constitutional Court <Complaints Chamber>, Order of 20 August 2015 – 1 BvR 2781/13 – Vz 11/14 –, NJW 2015, p. 3361 <3364 and 3365 para. 44> with further references). The complainant also does not complain of that processing time. 59

Landau Schluckebier Paulus Maidowski

Bundesverfassungsgericht, Beschluss der Beschwerdekammer vom 8. Dezember 2015 - Vz 1/15, 1 BvR 99/11

Zitiervorschlag BVerfG, Beschluss der Beschwerdekammer vom 8. Dezember 2015 - Vz 1/15, 1 BvR 99/11 - Rn. (1 - 59), http://www.bverfg.de/e/vb20151208_vz000115en.html

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