

Summary of Commission Decision
of 20 August 2018
declaring a concentration compatible with the internal market and the functioning of the EEA
Agreement
(Case M.8480 — Praxair/Linde)
(notified under document number C(2018) 5534)
(only the English version is authentic)
(Text with EEA relevance)
(2019/C 196/07)

On 20 August 2018, the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings⁽¹⁾, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision, as the case may be in the form of a provisional version, can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=2.

I. INTRODUCTION

- (1) On 12 January 2018, the European Commission ('the Commission') received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Praxair, Inc. ('Praxair') and Linde AG ('Linde') enter into a full merger within the meaning of Article 3(1)(a) of the Merger Regulation ('the Transaction'). The Transaction is accomplished by way of purchase of shares in a newly created company. Linde and Praxair are hereafter collectively referred to as the 'Notifying Parties' and each individually as 'Notifying Party'.

II. THE PARTIES AND THE TRANSACTION

- (2) Praxair and Linde are both international groups of companies active in the supply of a wide range of gases (industrial gases, medical gases, specialty gases, and helium) and related services, notably, homecare services for patients with respiratory problems, as well as engineering and plant construction services. Moreover, Praxair is also active in the provision of surface coating technologies.
- (3) On 1 June 2017, Praxair and Linde entered into a business combination agreement whereby they intend to merge their businesses in a so called 'merger of equals'. The Transaction entails the creation of a new company incorporated in Ireland, named 'Linde plc' ('New HoldCo'), and is structured, for Linde's shareholders, as an exchange offer under German law, and, for Praxair, as a reverse triangular merger under Delaware law. As a result, the Notifying Parties will be wholly owned subsidiaries of New HoldCo, in which the shareholders of Praxair and of Linde will hold, respectively and on a fully diluted basis, approximately 50 % each of the shares.
- (4) It follows that the Transaction is a concentration within the meaning of Article 3(1)(a) of the Merger Regulation.

III. UNION DIMENSION

- (5) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million. Each of them has a Union-wide turnover of more than EUR 250 million, but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified Transaction therefore has an Union dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. THE PROCEDURE

- (6) After a preliminary examination of the notification and based on the first phase market investigation, on 16 February 2018, the Commission decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation ('the Article 6(1)(c) Decision'). In the Article 6(1)(c) Decision, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the internal market and with the functioning of the EEA Agreement.

⁽¹⁾ OJ L 24, 29.1.2004, p. 1-22.

- (7) On 22 February 2018, the second phase investigation period was extended by ten working days at the request of the Notifying Parties pursuant to the second subparagraph, first sentence, of Article 10(3) of the Merger Regulation.
- (8) On 9 and 15 March 2018, the Notifying Parties submitted papers on aspects for which they requested the Commission to reconsider its preliminary conclusions in the Article 6(1)(c) Decision (collectively referred to as 'the Thematic Papers').
- (9) On 15 March 2018, the Commission adopted a decision pursuant to Article 11(3) of the Merger Regulation, following Linde's failure to provide complete information in response to an information request from the Commission ('the Article 11(3) Decision of 15 March 2018'). The Article 11(3) Decision of 15 March 2018 suspended the time limits referred to in the first subparagraph of Article 10(3) of Regulation (EC) No 139/2004. Linde responded to the RFI at issue on 19 March 2018 and the suspension expired at the end of that day.
- (10) Based on the second phase investigation which supplemented the findings of the first phase investigation, on 31 May 2018, the Commission issued a statement of objections pursuant to Article 18 of the Merger Regulation and Protocol 21 of the EEA Agreement ('the Statement of Objections').
- (11) On 14 June 2018, the Notifying Parties submitted their written reply to the statement of objections ('the Reply to the Statement of Objections').
- (12) On 20 June 2018, the Commission adopted a decision to extend the procedure by a total of ten working days in accordance with Article 10(3) second subparagraph, third sentence, of the Merger Regulation.
- (13) In order to address competition concerns identified by the Commission, the Notifying Parties submitted a first set of commitments on 20 June 2018 (the 'Initial Commitments'). The Commission launched a market test of the Initial Commitment on 22 June 2018.
- (14) Based on the results of the market test, the Commission gave the Notifying Parties its feedback on the Initial Commitments. Overall, the Commission considered that the Initial Commitments were capable of eliminating the competition concerns entirely in all markets where concerns were identified.
- (15) Thus, on 10 July 2018, the Notifying Parties submitted a further set of commitments (the 'Final Commitments'), which are in all material respects identical to the Initial Commitments and only contain a few amendments to the latter.
- (16) The Advisory Committee discussed a draft of the final decision on 6 August 2018 and issued a favourable opinion.

V. EXPLANATORY MEMORANDUM

A. Relevant markets

1. *Industrial gases*

- (17) In relation to industrial gases, the relevant product markets are:
 - Markets related to the tonnage supply of each of the following gases: oxygen, nitrogen, carbon monoxide, and carbon dioxide (for all of which, including both supplies via pipeline and through large on-site plants exceeding 100 tpd), as well as hydrogen (including both supplies via pipeline and through plants with name plate capacity above 0,3 tpd);
 - Markets related to the supply through small on-site plants of each of the following gases: oxygen, nitrogen (including plants with nameplate capacity below 100 tpd), as well as hydrogen (including plants with nameplate capacity below 0,3 tpd);
 - Markets related to the bulk supply of each of the following gases: oxygen, nitrogen, argon, acetylene, carbon monoxide, carbon dioxide and nitrous oxide (including supplies of volumes between 20 and 100 tpd by road or rail tankers, and excluding the supplies through small on-site plants for oxygen and nitrogen), as well as hydrogen (including supplies of volumes below 0,3 tpd by road or rail tankers, and excluding the supplies through small on-site plants);
 - Markets related to the cylinder supply of each of the following gases (including supplies of volumes between 1 and 1 000 metric tons per month through cylinders): oxygen, nitrogen, argon, hydrogen, and acetylene, as well as, for each gas, the possible segments for standard purity grades and high purity grades;

- Markets related to the cylinder supply of standard purity grades of each of carbon monoxide and nitrous oxide (high purity grades for these products being specialty gases constituting separate markets);
- A market related to the cylinder supply of carbon dioxide, excluding supplies in solid form, as well as the possible segments for carbon dioxide, excluding supplies in solid form, delivered in standard grades and high purity grades;
- A market related to the supply of carbon dioxide in solid form (known as dry ice).

(18) The geographic scope of the industrial gas markets is:

- EEA-wide for the markets related to the tonnage supply and the supply through small on-site plants, as well as, possibly, for the bulk supply of argon and nitrous oxide, and for the hypothetical segments or sub-segments for the cylinder supply of high purity grades of oxygen, nitrogen, argon, hydrogen, acetylene, and carbon dioxide;
- National, alongside country borders, for all other markets and segments identified above, with the exception of the region encompassing Belgium, Luxembourg and the Netherlands ('the Benelux'), which should be considered a single geographic dimension of the relevant product markets.

2. *Medical gases*

(19) In relation to medical gases, the relevant product markets are:

- Markets related to the bulk supply of each of the following medical gases: medical oxygen, medical nitrogen, medical nitrous oxide, medical carbon dioxide;
- Markets related to the cylinder supply of each of the following medical gases: medical oxygen, medical nitrogen, medical nitrous oxide, medical carbon dioxide, medical nitric oxide, and medical argon.

(20) The geographic scope of the medical gas markets is national.

3. *Specialty gases*

(21) In relation to specialty gases, the relevant product markets are:

- Markets related to the cylinder supply of the following noble gases and noble gas mixtures: krypton, xenon, neon, brominated compound gas mixtures, fluorine noble gas mixtures, hydrogen chloride noble gas mixtures, inert noble gas mixtures;
- Markets related to the cylinder and bulk supply of electronic specialty gases (ESGs), with each gas constituting a relevant product market;
- Markets related to the cylinder supply of chemical gases, with each gas constituting a relevant product market;
- Markets related to the cylinder supply of the following calibration and other gas mixtures: environmental mixtures, special application mixtures, and other calibration mixtures;
- Markets related to the cylinder supply of refrigerants, with each gas constituting a relevant product market.

(22) The geographic scope of the specialty gas markets is:

- EEA-wide for the markets related to the cylinder supply of noble gases and noble gas mixtures, and the cylinder and bulk supply of ESGs;
- National for the markets related to the cylinder supply of chemical gases, calibration and other gas mixtures, and refrigerants.

4. *Helium*

(23) In relation to helium, the relevant product markets are:

- A market related to the wholesale supply of helium (including the sourcing of helium);
- Markets related to the retail supply of helium, as well as, the following potential sub-markets: retail supply in cryogenic portable tanks, retail supply in dewars, retail supply in tube trailers, retail supply of standard purity helium in cylinders, and retail supply of high purity helium in cylinders.

(24) The geographic scope of the markets for the supply of helium is:

- Global for the helium wholesale market, as well as for the potential market for the retail supply of helium in cryogenic portable tanks;
- National for the markets related to the retail supply of helium and its possible sub-markets (with the exception of the potential market for the retail supply of helium in cryogenic portable tanks).

5. *Supply of process plants and plant components*

(25) In relation to the supply of process plants and plant components, the product and the geographic market definition can be left open as the Transaction is unlikely to lead to a significant impediment of effective competition under either alternative regardless of the definition of the market definition.

6. *Respiratory homecare services*

(26) In relation to respiratory homecare services, the relevant product markets are:

- A possible market comprising all respiratory homecare therapies;
- A possible market comprising all oxygen-based therapies and a possible separate market for each oxygen-based therapy separately, that is to say LOX, GOX and COX;
- A possible market comprising all non-oxygen therapies and a possible separate market for each non-oxygen based therapy, that is to say sleep, ventilation and aerosol.

(27) The geographic scope of the relevant markets for the supply of respiratory homecare services is national.

7. *Surface coating services*

(28) In relation to surface coating services, the product and geographic market definition can be left open as the Transaction is unlikely to lead to a significant impediment of effective competition under either alternative regardless of the definition of the market definition.

B. **Competitive assessment**

1. *Unilateral effects*

(29) The Decision concludes that the Transaction will lead to a significant impediment of effective competition as a result of horizontal non-coordinated effects in the following markets:

(30) In relation to industrial gases:

- (a) in the EEA tonnage markets for carbon monoxide, nitrogen, and oxygen, as well as in the EEA small on-site plant supply of oxygen and nitrogen, as a result of the elimination of the important competitive constraints exerted by the Notifying Parties, on each other, as well as on their remaining competitors. On the basis of the bidding analysis, the Commission also considers that the Notifying Parties are close competitors in these markets and that the Transaction is likely to eliminate an important competitive force in the EEA tonnage market for oxygen and in the EEA small on-site plant supply of oxygen and nitrogen. The Commission found that the reduction of the competitive pressure resulting from the Transaction in those markets is not likely to be counteracted by other competitive constraints which will remain on the markets. Therefore, the Commission considers that the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;

- (b) in the vast majority of affected national/Benelux markets for the bulk and cylinder supply of industrial gases and for the supply of dry ice, as a result of the creation or the strengthening of a dominant position or, at least, the removal of a significant competitive constraint. The Commission found that, in those markets, the Notifying Parties are close competitors and exert important competitive constraints on each other, as well as on the remaining competitors. The Commission also found that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints which will remain on the markets. Therefore, the Commission considers that the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;
- (31) In relation to medical gases: in the large majority of affected markets for the bulk and cylinder supply of medical gases, as a result of the creation or the strengthening of a dominant position or, at least, the removal of a significant competitive constraint. The Commission found that, in those markets, the Notifying Parties are close competitors and exert important competitive constraints on each other, as well as on the remaining competitors. The Commission also found that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints which will remain on the markets. Therefore, the Commission considers that the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;
- (32) In relation to specialty gases, in the EEA markets for the cylinder supply of noble gases and noble gas mixtures, the EEA markets for the cylinder and bulk supply of ESGs ⁽²⁾, some national markets for the cylinder supply of chemical gases ⁽³⁾, and some national markets for the cylinder supply of calibration and other gas mixtures ⁽⁴⁾. This occurs as a result of either the creation or strengthening of a dominant position or, at least, the removal of a significant competitive constraint. The Commission found that the Notifying Parties are close competitors and exert important competitive constraints on each other, as well as on their remaining competitors. The Commission also found that the reduction of the competitive pressure resulting from the Transaction in those markets is not likely to be counteracted by other competitive constraints which will remain on the markets concerned. Therefore, the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;
- (33) In relation to helium:
- (a) in the global wholesale market, as a result of the creation or strengthening of a dominant position, or, at least, the removal of an important competitive constraints. The Commission found that the wholesale market is oligopolistic and characterised by high barriers to entry, notably due to the scarcity of helium, which is extracted from a limited number of sources worldwide. The Commission also found that, in this market, the Notifying Parties are close competitors and exert important competitive constraints on each other, as well as

⁽²⁾ In relation to the cylinder supply of ESGs: (i) ammonia, (ii) boron trichloride, (iii) chlorine, (iv) deuterium, (v) diborane and mixtures, (vi) dichlorosilane, (vii) germane and mixtures, (viii) halocarbon 116, (ix) halocarbon 23, (x) halocarbon 318, (xi) halocarbon 41, (xii) high purity nitrous oxide, (xiii) hydrogen bromide, (xiv) hydrogen chloride, (xv) hydrogen fluoride, (xvi) nitrogen trifluoride, (xvii) phosphine and mixtures, (xviii) silane and mixtures, (xix) silicon tetrachloride, (xx) silicon tetrafluoride, (xxi) sulphur hexafluoride, (xxii) tetrafluoromethane, (xxiii) trichlorosilane. In relation to the bulk supply of ESGs: (i) nitrogen trifluoride.

⁽³⁾ (i) Austria, in relation to ethylene and sulphur dioxide; (ii) Czech Republic, in relation to chlorine, ethane, ethylene, hydrogen sulphide, nitric oxide, sulphur dioxide and sulphur hexafluoride; (iii) Denmark, in relation to ammonia, butene, methane and nitric oxide; (iv) Germany, in relation to ethylene, carbon monoxide, methane and nitric oxide; (v) Italy, in relation to ethylene oxide and isobutane; (vi) the Netherlands, in relation to butane, carbon monoxide, methane and propane; (vii) Norway, in relation to ammonia, butane, ethane and methane; (viii) Portugal, in relation to methane; (ix) Romania, in relation to ethylene, methane and propane; (x) Slovakia, in relation to methane; (xi) Slovenia, in relation to sulphur dioxide and sulphur hexafluoride; (xii) Spain, in relation to methane; (xiii) Sweden, in relation to methane; and (xiv) United Kingdom, in relation to methane and propane.

⁽⁴⁾ (i) Austria, in relation to environmental and special application mixtures; (ii) Bulgaria, in relation to environmental and special application mixtures; (iii) Czech Republic, in relation to environmental and special application mixtures; (iv) Denmark, in relation to environmental and special application mixtures; (v) Germany, in relation to environmental, other calibration and special application mixtures; (vi) Hungary, in relation to environmental, other calibration and special application mixtures; (vii) Italy, in relation to environmental mixtures; (viii) the Netherlands, in relation to environmental, other calibration and special application mixtures; (ix) Norway in relation to environmental and special application mixtures; (x) Poland, in relation to special application mixtures; (xi) Portugal, in relation to environmental and special application mixtures; (xii) Romania, in relation to special application mixtures; (xiii) Slovakia, in relation to other calibration and special application mixtures; (xiv) Slovenia, in relation to environmental, other calibration and special application mixtures; (xv) Spain, in relation to environmental and other calibration mixtures; (xvi) Sweden, in relation to environmental and special application mixtures; and (xvii) the United Kingdom, in relation to special application mixtures.

on the remaining competitors. Post-Transaction, the merged entity would notably have a sourcing portfolio with no equivalent on the market (in terms of size and diversity). The Commission considers that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints which will remain on the markets. Therefore, the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;

- (b) in a large number of affected markets for the retail supply of helium (and potential sub-markets) as a result of either the creation or strengthening of a dominant position or, at least, the removal of a significant competitive constraint. The Commission found that the Notifying Parties are close competitors and exert important competitive constraints on each other as well as on their remaining competitors. In particular, in several EEA countries, the merged entity would have very large market shares and a limited number of credible competitors. The Commission considers that the reduction of the competitive pressure resulting from the Transaction in those markets is not likely to be counteracted by other competitive constraints which will remain on the markets concerned. Therefore, the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases;
- (34) In relation to respiratory homecare services⁽⁷⁾: in Spain and Portugal (under all possible market definitions), as the Transaction would reduce the number of significant players from three to two, leaving Air Liquide as the only credible alternative in the market(s). The Commission also found that, in both countries, the Notifying Parties are close competitors and exert important competitive constraints on each other and, more generally, on the market(s). The Commission also found that the reduction of the competitive pressure resulting from the Transaction is not likely to be counteracted by other competitive constraints which will remain on the market(s). Therefore, the Commission considers that the Transaction is likely to lead to a significant impediment of effective competition in the form of price increases.
- (35) With respect to the EEA tonnage market for hydrogen, the Decision acknowledges that the evidence with respect to the horizontal non-coordinated effects of the Transaction is not as compelling as for the other tonnage markets. In any event the Commission considers that there is no need to conclude on the horizontal non-coordinated effects of the Transaction in the EEA tonnage market for hydrogen, because the Final Commitments aiming at remedying the horizontal non-coordinated effects of the Transaction in the other markets for industrial gases also exclude the possibility that the Transaction will lead to horizontal non-coordinated effects in the EEA tonnage market for hydrogen. Indeed, the Final Commitments will fully remove the overlap between Linde's and Praxair's activities in the latter market.
- (36) The Decision concludes that, for all other horizontally affected markets, it is unlikely that the Transaction will lead to a significant impediment of effective competition as a result of horizontal non-coordinated effects. In any event, the Commission also notes that the Final Commitments aiming at remedying the non-coordinated horizontal effects of the Transaction which would result into a significant impediment of effective competition also exclude the possibility that the Transaction will lead to horizontal effects in the other markets. Indeed, the Final Commitments will fully remove the overlap between Linde's and Praxair's activities in all horizontally affected markets.

2. Vertical effects

- (37) The Decision concludes that the Transaction will lead to a significant impediment of effective competition as a result of vertical non-coordinated effects in relation to the vertical links between the upstream global helium wholesale market and the downstream helium retail markets. The Commission found that:
- (a) the Notifying Parties would have the ability and incentive to foreclose access to helium. In particular, the Commission notes that (i) the merged entity would have a dominant position upstream and the ability to reduce its helium supply; (ii) alternative suppliers are limited and face capacity constraints; and (iii) foreclosing access to helium would be profitable since the downstream sales diverted away from foreclosed rivals are characterised by high margins and likely to be captured by the new entity;
- (b) the implementation of an input foreclosure strategy by the new entity would likely (i) lead to price increases in the helium markets; (ii) raise barriers to entry to potential competitors; and (iii) impact other markets, helium being a 'must-have' product which enables to sell other gases.

⁽⁷⁾ In the EEA, Praxair is active only in Spain, Portugal, and Italy. In relation to the respiratory homecare services market(s) in Italy, the Decision concludes that the Transaction is unlikely to lead to a significant impediment to effective competition.

- (38) The Decision concludes that for all other vertically affected markets it is unlikely that the Transaction will lead to a significant impediment of effective competition as a result of vertical non-coordinated effects. In any event, the Commission also notes that the Final Commitments aiming at remedying the non-coordinated horizontal effects of the Transaction which would result into a significant impediment of effective competition also exclude the possibility that the Transaction will lead to vertical effects. Indeed, the Final Commitments will fully remove the overlap between Linde's and Praxair's activities in all upstream and downstream affected markets.

3. Coordinated effects

- (39) The Commission did not find compelling evidence pointing to a material change of the incentives to coordinate of the merged entity and its remaining competitors post-Transaction in any of the horizontally affected markets.
- (40) In any event, the Commission considers that there is no need to conclude on the horizontal coordinated effects of the Transaction, because the Final Commitments aiming at remedying the horizontal non-coordinated effects of the Transaction in those markets also exclude the possibility that the Transaction will lead to horizontal coordinated effects. Indeed, the Final Commitments will fully remove the overlap between Linde's and Praxair's activities in all horizontally affected markets.

VI. COMMITMENTS

- (41) The Final Commitments comprise three elements: the Revised EEA Commitments, the Revised SIAD Commitments, and the Revised Helium Sourcing Commitments.
- (42) The Revised EEA Commitments, which consists of a commitment to divest within a set time frame to one single suitable purchaser Praxair's entire gas business in the EEA (the 'Revised EEA Divestment Business'), including Praxair's European engineering capabilities, and excluding SIAD (Società Italiana Acetilene e Derivati S.p.A.) ('SIAD'). The divestiture of the EEA Divestment Business will be implemented by way of (a) share and/or asset purchase agreement(s), which would cause the transfer to the purchaser of all relevant legal entities, assets and personnel related to the EEA Divestment Business.
- (43) SIAD (including affiliated undertakings) and Rivoira (including affiliated undertakings) are currently jointly controlled by Praxair and Flow Fin of Italy. The Revised SIAD Commitments provide for a share swap, whereby Praxair will transfer to Flow Fin its direct and indirect shareholdings in SIAD and in SIAD's affiliated undertakings, while Flow Fin will transfer to Praxair its direct and indirect shareholdings in Rivoira and Rivoira's affiliated undertakings. As a result of this, SIAD (together with its affiliated undertakings) will be solely controlled by its current other shareholder and Rivoira (together with its affiliated undertakings) will be solely controlled by the Revised EEA Divestment Business.
- (44) In addition, the SIAD Commitments include a number of transitional arrangements for the supply of products and services currently provided by Praxair (including from entities that are part of the Revised EEA Divestment Business) to SIAD, and by SIAD to Praxair (including to entities that are part of the Revised EEA Divestment Business).
- (45) While helium sourcing contracts forming part of the Revised EEA Divestment Business are included in the Revised EEA Commitments (as described above), the Revised Helium Sourcing Commitments provide for the divestiture of helium sourcing contracts (either by way of transferring existing sourcing contracts or by way of entering into back to back supply arrangements) and other related assets (the 'Revised Helium Sourcing Divestment Business') to the buyer(s) of the divestiture package(s) to be agreed with other competition authorities than the European Commission, in particular the United States Federal Trade Commission.
- (46) The Revised Helium Sourcing Divestment Business will comprise such an amount of helium sourcing contracts that, when combined with the helium sourcing contracts that form part of the Revised EEA Divestment Business, the overall helium sourcing volume divested globally will be equivalent to virtually all of Praxair's existing global helium sourcing volumes.
- (47) The Commission concluded that the Final Commitments address the competition issues raised by the Transaction, as they will fully remove the overlaps between Linde's and Praxair's activities in all affected markets. The viability of the Revised EEA Divestment Business and of SIAD would not be impacted by the disentanglement of the two businesses as the investigation provided evidence that they already operate with a relative degree of independence already pre-Transaction.

VII. CONCLUSION

- (48) For the reasons mentioned above, and subject to compliance with the Final Commitments, the Decision concludes that the proposed concentration will not significantly impede effective competition in the Internal Market or in a substantial part of it.
- (49) Consequently the Commission declares the concentration compatible with the Internal Market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.
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