

# HIGHLIGHTS AND ISSUES CONCERNING THE AMENDMENT OF CHINA'S ANTIMONOPOLY LAW



BY XIAOYE WANG<sup>1</sup>



<sup>1</sup> Distinguished Professor at Shenzhen University and Law Professor at the Chinese Academy of Social Sciences.

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## HIGHLIGHTS AND ISSUES CONCERNING THE AMENDMENT OF CHINA'S ANTIMONOPOLY LAW

By Xiaoye Wang

The first amendment to the *Anti-Monopoly Law of the PRC* came into effect in August 2022 since it was promulgated in 2007. From a macro perspective, this amendment emphasizes the fundamental status of competition policy in the various national economic policies and introduces fair competition review system; while in terms of micro aspects, it strengthens anti-monopoly enforcement in the digital economy, introduces 'safe harbor' rule for some vertical agreements, and enhances legal deterrence for anticompetitive violations. Nevertheless, the revised AML contains some issues worth further discussion and improvement, in particular it should not only recruit new contents, but also scrap some outdated provisions with theoretical or practical defects.

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## I. INTRODUCTION

On June 24, 2022, the 35th meeting of the Standing Committee of the 13th National People's Congress adopted the Draft Anti-Monopoly Law (Amendment), which came into effect in August 2022. The new Anti-Monopoly Law has 70 articles in 8 chapters, with 13 new articles added and 23 articles modified from the past. Parts I to IV of this paper review the highlights of this amendment, Part V discusses several important issues that should have been considered during the amendment, and the conclusion comes at the end of this paper.

## II. STRENGTHEN THE BASIC POSITION OF COMPETITION POLICY

The biggest highlight of the amendment of the Antimonopoly Law is the addition of the expression "the State shall strengthen the basic position of competition policy" in Article 4. This indicates that the basic way of allocating resources and regulating supply and demand in other economic fields is the market-based competition mechanism, except for the industries in which the state-owned economy is in control and which are related to the lifeline of the national economy and national security, as well as the industries franchised and monopolized according to the law, as stated in Article 8.

Another important aspect of strengthening the basic position of competition policy is the introduction of a fair competition review system. Article 5 provides that "the State shall establish and improve a fair competition review system. Administrative organs and organizations authorized by laws and regulations with the function of managing public affairs shall conduct a fair competition review when formulating regulations involving economic activities of market players." The 2016 Opinions of the State Council on Establishing a Fair Competition Review System in the Construction of the Market System states, "In order to regulate relevant government behavior, prevent the introduction of policies and measures that exclude or restrict competition, and gradually clean up and abolish regulations and practices that hinder the national unified market and fair competition, China needs to establish a fair competition review system in the construction of the market system."

Five ministries and commissions, including the General Administration of Market Regulation, the National Development and Reform Commission, and the Ministry of Finance, also jointly issued the "Rules for the Implementation of the Fair Competition Review System" in June 2021, which proposed 18 criteria for fair competition review in four areas, including market access and exit, free flow of goods and factors, impacts on production and business costs, and impacts on production and business practices. According to these criteria, unless for considerations of national economic security, overall economic interests and social public interests, enterprises operating in the market, whether state-owned or private, and whether Chinese or foreign, should be able to compete fairly in the market and receive equal legal protection. Like the prohibition of administrative monopoly in the Antimonopoly Law, the fair competition review also restrains the government's behavior. The difference between the two is that the fair competition review is a prior prevention of administrative monopoly behavior, i.e., the government's abuse of administrative power to exclude or restrict competition is nipped in the bud. With the entry of fair competition review into the Antimonopoly Law as a legal procedure that must be carried out by government agencies to introduce rules and regulations involving the business activities of market players, this further puts government behavior into the cage of the system and helps to solve the problem of unreasonable and excessive government intervention in the market.

As the anti-monopoly law strengthens the basic status of competition policy, it is necessary to briefly discuss the purpose of anti-monopoly legislation here. Article 1 only proposes to protect fair competition without mentioning the protection of free competition, which is incomplete. The anti-monopoly law prohibits monopoly agreements, over-sized M&A, and abusive behaviors by dominant market players to safeguard the competitive market, and it also prohibits the abuse of administrative power to restrict competition. Although these provisions are intended to uphold fair competition, their main value is to safeguard economic democracy and protect the free rights of enterprises to participate in market competition.

Therefore, as the purpose of anti-monopoly legislation, Article 1 should emphasize more on maintaining free competition in the market. Article 1 of the revised Antimonopoly Law also adds "encourage innovation." Some people think this is a significant development of the Antimonopoly Law, but I think this is a problem in theory. Since the top idea of the Anti-monopoly Law is to oppose monopolies and protect competition, and if "encouraging innovation" is juxtaposed as the purpose of anti-monopoly legislation, the question of which purpose should take priority in some cases inevitable. On the other hand, "encouraging innovation" becomes the purpose of antitrust legislation, which requires the state to take relevant measures to enhance the innovation of enterprises. For example, in order to support innovation, the government may adopt industrial policies, especially fiscal subsidies, and the bulk of which usually go to state-owned enterprises. Since improving innovation and encouraging innovation are different issues, "encouraging innovation" and "protecting competition" should not be deemed as equal in the Anti-monopoly Law.

### III. STRENGTHEN THE DIGITAL ECONOMY ANTI-MONOPOLY

Article 9 of the General Provisions of the revised Antimonopoly Law provides that "operators shall not take advantage of data and algorithms, technology, capital and platform rules to engage in monopolistic acts prohibited by this Law." Given that the general provisions relate to the purpose of the legislation, the scope of adjustment, the basic principles, and other elements that are of guiding significance to the entire law, this provision is an important guide for law enforcement authorities dealing with monopoly agreements, abuse of dominant market position and merger control involving the digital economy.

#### ***A. Prohibiting Algorithmic Complicity***

While the Antimonopoly Law does not clarify the "algorithmic conspiracy," the Antimonopoly Committee of the State Council's "Antimonopoly Guidelines on the Platform Economy" does refer to the issue of price conspiracy through algorithms and Hub-and-Spoke collusions. For example, algorithmic conspiracy may occur when companies in the same industry use the same algorithm and set the prices of their products based on the output and demand of the industry. Manufacturers selling products through e-commerce platforms can use algorithms or technology to track retailers' prices for the purpose of unified resale price maintenance (RPM). As price conspiracy or resale price maintenance can raise prices to harm consumers, even if the algorithms or technical means used here are neutral, these actions should still be subject to antitrust laws.

#### ***B. Prohibition of Abuse of Dominant Market Position***

In addition to General Article 9, Article 22(2) of the Anti-Monopoly Law provides that "an operator with a dominant market position shall not use data and algorithms, technology, and platform rules to engage in the abuse of a dominant market position specified in the preceding articles." Here, this includes unfair overpricing practices as well as unfair low-cost sales, refusal to deal, forced transactions, tied sales, and differential treatment committed by large platform companies. Abuses in the platform economy generally involve data transactions, especially data transactions with SMEs. For example, the administrative penalty decision issued by the General Administration of Market Regulation against Alibaba for "two-for-one" conduct in the e-commerce sector states that "since 2015, the party concerned has abused its dominant position in the market of e-tailing platform services in China to prohibit operators on the platform from opening stores or participating in promotional activities on other competing platforms, which has excluded and restricted competition in the market, ... constituting an abuse of dominant market position prohibited by the Anti-Monopoly Law."<sup>2</sup> This indicates that data transactions between large platform companies and third-party companies are allowed for data open on fair, reasonable and non-discriminatory terms.

#### ***C. Control of business Operator Concentration***

Article 9 of the Anti-monopoly Law prohibits enterprises from engaging in monopolistic acts prohibited by the Anti-monopoly Law through "capital advantage," which includes the concentration of business operators with the effect of excluding or restricting competition. Article 26(2) also provides that "if the concentration of operators does not meet the declaration standards set by the State Council, but there is evidence that the concentration of operators has or may have the effect of excluding or restricting competition, the anti-monopoly enforcement agency of the State Council may require the operators to declare it." This indicates that the Anti-monopoly Law shall strengthen the control of operator concentration even if that does not meet the notification standard but may have effect of excluding or restricting competition, in order to avoid and reduce the situation where the market sales of the enterprises involved are not large, but the M&A transaction has a large impact on market competition. The Anti-Monopoly Guidelines for Platform Economy states that "law enforcement agencies should pay high attention to operator concentrations in the platform economy where one of the operators involved in the concentration is a start-up or an emerging platform, where the operator involved in the concentration has a low turnover due to the adoption of a free or low-price model, where the relevant market concentration is high, and where the number of competitors involved is small. For the operator does not meet the notification standards but has or may have the effect of excluding or restricting competition, the anti-monopoly enforcement agency of the State Council will investigate and deal with it according to law."

It is necessary to point out here that even though the Antimonopoly Law strengthens the regulation of M&A activities of Internet companies, it should not prohibit all M&A activities of Internet companies in a "one-size-fits-all" manner. In other words, economic analysis of M&A in the Internet sector should still be conducted, taking into account not only the impact of M&A on competition, but also the motives of M&A, and not only the motives of the acquirer, but also the motives of the acquired party, such as preventing bankruptcy or achieving complementary advantages. The voice of the China Central Leading Group on Financial and Economic Affairs in August 2021 was that "strengthening the regu-

<sup>2</sup> [Decision on Administrative Punishment by the State Administration for Market Regulation - State Administration of Municipal Supervision \[2021\] No. 28.](#)

lation of large technology enterprises such as Internet platforms to prevent monopoly and disorderly expansion of capital is a worldwide problem for which all countries are exploring solutions. We insist on both regulation and development simultaneously and equivalently."<sup>3</sup>

## IV. INTRODUCTION OF THE "SAFE HARBOR" RULE

Article 18(3) of the Anti-monopoly Law provides that "if an operator can prove that its market share in the relevant market is lower than the standard set by the anti-monopoly enforcement agency of the State Council and meets other conditions set by the anti-monopoly enforcement agency of the State Council, it shall not be prohibited." Because the market share is used as a criterion for exempting monopoly agreements here is clearly a reference to the "safe harbor" system of the EU competition law.

The De Minimis Notices published by the European Commission in 1970 established the 'safe harbor'. If it can be judged that the competitive damage of an anticompetitive agreement is not significant according to the market position of the parties to the agreement, the agreement may not be prohibited by Article 101 (1) TFEU. That is to say, 'safe harbor' is established for agreements between undertakings whose market shares fall below certain threshold.<sup>4</sup> In accordance with the current *De Minimis Notice*, an agreement falls under 'safe harbor' if (1) the aggregated market shares of competitors are no more than 10 per cent; (2) the market shares of neither non-competitive parties (be them are from upstream and downstream markets; or from adjacent markets) are more than 15 per cent.<sup>5</sup>

Another important aspect of the "safe harbor" rule of EU competition law is that it emphasizes that agreements within the "safe harbor" must not substantially restrict competition, and therefore the *De Minimis* Notice specifies that the "safe harbor" rule shall not apply to agreements whose object is to prevent, restrict or distort competition in the internal market<sup>6</sup>, in particular not to "hard-core cartels" and "hard-core restrictions" introduced by the European Commission in its series of block exemption regulations.<sup>7</sup> For example, the European Commission's Guidelines on Vertical Restraints explicitly state that "agreements fixing resale prices or limiting minimum resale prices, directly or indirectly, alone or in combination with other factors, are 'hardcore restraints' and cannot be subject to the Block Exemption Regulation because they not only violate Article 101(1) of the Treaty, but also make it difficult to meet the conditions for exemption under Article 101(3)."<sup>8</sup> These prerequisites suggest that the "safe harbor" of EU competition law is a rule that satisfies certain conditions and thereby precludes them from being competitively harmful or can be found lawful without assessing specific market circumstances.

The "safe harbor" of China's Anti-monopoly Law is placed in Article 18, which deals with vertical agreements. Paragraph 1 of this article prohibits an operator and its counterparty from entering into (1) a fixed price for reselling goods to a third party; (2) a limited minimum price for reselling goods to a third party; or (3) other monopoly agreements as determined by the anti-monopoly enforcement agency of the State Council. For the preceding paragraph (1) and (2), Paragraph 2 states that if the operator can prove that it does not have the effect of excluding or restricting competition, it is not prohibited. Paragraph 3 introduces the "safe harbor" rule mentioned above. The introduction of the "safe harbor" in the Antimonopoly Law is intended to improve enforcement transparency and save enforcement resources. However, the "safe harbor" rule introduced by the Antimonopoly Law has not been very successful because of the following problems.

The first problem is that the agreement in the "safe harbor" is not safe. Obviously, the "safe harbor" rule should be based on the enforcement experience, i.e. a "safe harbor" can be established if one is confident that a certain range of conduct is unlikely to produce serious competitive harm. However, if a agreement in "safe harbor" may still be found to be illegal, the "safe harbor" is not sufficiently transparent and cannot effectively help businesses avoid the risks of violating anti-monopoly law. According to Article 18(3) of the Antimonopoly Law, in addition to the market share standard, the "safe harbor" rule must "meet other conditions set by the antimonopoly enforcement agency of the State Council." Article 18(2) also provides that the business operator "shall be able to prove that it does not have the effect of excluding competition," and this "safe harbor" rule is unlikely to greatly improve the efficiency of antitrust enforcement because the agreement in "safe harbor" is not safe.

3 China Central Finance Office, 'Common Prosperity is Not "killing the Rich to Help the Poor, Rectifying the Internet Platforming is Definitely not Targeting Private Enterprises' (*sohu*, 26 August 2021) <[https://www.sohu.com/a/485866356\\_313745](https://www.sohu.com/a/485866356_313745)> accessed 26 January 2023

4 European Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) (2014/OJ C 291/01).

5 *ibid*, §§ 8, 9.

6 See § 2, *De Minimis Notice* (2014/OJ C 291).

7 See § 13, *De Minimis Notice*, 2014/OJ C 291.

8 COMMISSION Guidelines on Vertical Restraints, Section 2.10.

The second issue is the placement of the "safe harbor" rule in Article 18, which deals with vertical agreements, which suggests that it does not apply to horizontal agreements between competitors. Although horizontal agreements may restrict competition to a greater extent than vertical agreements, it cannot be said that there is no "safe harbor" for cooperation between competitors. In fact, according to Article 20 of the Antimonopoly Law many kind of horizontal agreements may be exempted provided that "the business operator shall prove that the agreement reached does not substantially restrict competition in the relevant market and enables consumers to share in the benefits arising therefrom." In order to improve the efficiency of enforcement and the predictability of the parties, the Antimonopoly Law should, for the long run, also establish a "safe harbor" system for certain agreements between competitors, such as specialization agreements and R&D agreements as proposed in Article 20.

The third issue is the application of the "safe harbor" for RPM in China's Antimonopoly Law. There are two different philosophies of RPM for administrative enforcement and justice in China: administrative enforcement generally considers them illegal, while courts generally consider them legal based on "rule of reason".<sup>9</sup> I advocate that RPM is illegal in principle, but the parties have the right to defend themselves. RPM, in principle, should be prohibited in China because, on the one hand, RPM seriously damages price competition among sellers and objectively raises prices to hurt the interest of consumers as a result; on the other hand, because China enacted the Anti-Monopoly Law relatively late, the business community generally lacks anti-monopoly awareness and competition culture, RPM is common among manufacturing enterprises. For example, the infant milk powder case handled by the NDRC in 2013 involved almost all brands in the industry.<sup>10</sup> The two cases of Gree and Haier air conditioners in 2016 show that the highly concentrated industry also has a serious RPM problem, i.e. almost every household air conditioner in the market contains a high retail fee.<sup>11</sup> The 2019 Beijing Market Supervision Bureau's investigation suspension on Lenovo indicates the largest producer in the Chinese PC market has long used the RPM model for its various products, including spare parts sales and repair services,<sup>12</sup> which can tell the severity of RPM in the Chinese market. Therefore, the "safe harbor" rule according to the AML should not be applied to RPM because it can very often seriously harm market competition in China.

## V. INCREASE PENALTIES FOR VIOLATIONS

The Antimonopoly Law increases the penalties for violations, as shown in the following areas:

### ***A. Increase the Penalty for Illegal Operator Concentration***

Before the amendment, the Antimonopoly Law provided that an operator concentration implemented in violation of the law may be subject to a fine of up to RMB 500,000 in addition to stopping the implementation of the concentration and taking necessary measures to restore it to its pre-concentration state. In view of the fact that the operator concentration that should have been notified cannot be restored to the pre-concentration state by splitting, an administrative fine of 500,000 yuan for the illegally implemented concentration is insignificant and not a deterrent to large enterprises, Article 58 of the amended Anti-Monopoly Law provides that "an operator who implements a concentration in violation of the provisions of this Law... shall be fined up to ten percent of the previous year's sales; if it does not have the effect of excluding or restricting competition, a fine of not more than 5 million yuan shall be imposed."

### ***B. Introduce Personal Responsibility***

Article 56, which deals with monopoly agreements, provides that "the legal representative, the principal person in charge and the person directly responsible for the operator who is personally liable for entering into a monopoly agreement may be fined up to one million yuan." The personal liability here should be for the hard-core cartel which is illegal. Since the direct purpose of the hard-core cartel is to exclude and restrict competition, it is reasonable to impose personal liability on the leaders or senior employees of the enterprise responsible for organizing or participating in the hard-core cartel, considering that the imposition of personal liability can further increase the deterrent effect on illegal conduct.

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9 See "A Critique of the Application of the "Rule of Reason" to the Resale Price Maintenance according to China's AML," Legal and Commercial Research, Vol. 1, No. 2021, p. 43 by Wang Xiaoye.

10 See "Dometic Wyeth and other milk powder under antitrust investigation," <http://finance.sina.com.cn/focus/nfqyzt/>, 2020-5-1.

11 See "A Critique of the Application of the "Reasonable Principle" to the Antitrust Regulation of Resale Price Maintenance," Legal and Commercial Research, Vol. 1, No. 2021, p. 43, written by Wang Xiaoye.

12 See "Antitrust Investigation Discontinued Due to Lenovo's Aggressive Cooperation? , <https://finance.sina.com.cn/stock/relnews/hk/2019-11-19/doc-iihnzhfz0353432.shtml>, 2020-5-1.

### ***C. Add a Special Deterrent Clause***

Article 63 of the Antimonopoly Law provides that " For violations of the provisions of this Law with particularly serious circumstances, bad impacts and serious consequences, the State Council anti-monopoly enforcement agencies can determine the specific fines between two times and five times of the prescribed amount at least two times or five times the number specified in ..... this Law. " Considering the stability and predictability of the law and the lack of transparency of the determination of " particularly serious circumstances, bad impacts and serious consequences " in practice due to the discretion of law enforcement agencies, I suggest that law enforcement agencies should make detailed explanations or adopt guiding cases to explain. For example, the EU Fines Guidelines provide that "if the European Commission or a member state competition enforcement agency determines that an enterprise has violated Article 101 or 102 of The Treaty of Operations of the European Union, it may increase the base fine for the determined violation by 100% if the enterprise is found to have continued or repeated the same or similar violations. "<sup>13</sup>

### ***D. Increase Criminal Liability***

Article 67 of the Antimonopoly Law provides that "if a crime is committed, criminal liability shall be investigated in accordance with law." The introduction of criminal liability helps to increase the deterrent effect of the Law, but here criminal investigations, prosecutions and criminal imprisonment of corporate executives entail costs. Given the great uncertainty of antimonopoly cases, cases imposing criminal liability should be limited to hardcore cartels that are illegal.

### ***E. The Entire Sales of the Offending Enterprise as the Basis for Administrative Fines***

The Antimonopoly Law provides that the offending enterprise may be fined "one to ten percent of the previous year's sales ," but how to calculate the "sales" is not clearly defined. The Antimonopoly Bureau of the State Administration for Market Regulation has made the following statement on "sales": "After consulting with the Legal Affairs Commission of the National People's Congress, in principle, in the enforcement of monopoly cases, all sales of the operator are used as the basis for calculating the fine."<sup>14</sup> For Alibaba's e-commerce platform "either or choice " behavior, the State Administration for Market Regulation 2021 imposed a fine of 4 percent of its 2019 sales within China of RMB 455.712 billion, totaling RMB 18.228 billion.<sup>15</sup> The Supreme People's Court also recently endorsed the Hainan Administration for Market Regulation's 2020 administrative fine against Shenghua, which was based on Shenghua's entire 2018 sales, but only less than 1 percent of all sales involved in the violation.<sup>16</sup>

The purpose of using the entire market sales of the offending enterprise as the base for fines is to increase antimonopoly deterrence. However, even if the deterrent effect is increased, there should be a reasonable range of fines for illegal acts. In antimonopoly cases, this should refer to the relevant markets, including the relevant commodity markets and the relevant geographical markets.<sup>17</sup> If, instead of considering which products or which services are in violation of the law, sales are calculated according to the entire business of the enterprise, this may result in fines for legitimate business activities. Such a penalty is not only unreasonable but also unlawful, because even if the enforcement authorities question the existence of other business activities of the enterprise, they have to be regarded as lawful before they can make a penalty decision based on evidence, while lawful business activities should not be subject to administrative penalties. The antimonopoly enforcement authorities should seriously consider this issue, which not only involves the significant interests of enterprises, but also concerns the scientific and rational nature of anti-monopoly enforcement.

## **VI. REMAINING ISSUES FOR THE AMENDMENT**

In my opinion, the amendment of the Antimonopoly Law should not only add provisions that are urgently needed in law enforcement but also delete provisions that are impossible to apply.

<sup>13</sup> Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) (a) of Regulation No 1/2003, O.J. [2006] C 210/2, para 28.

<sup>14</sup> By the Anti-Monopoly Bureau of the State Administration for Market Regulation, China Anti-Monopoly Legislation and Enforcement Practice, China Industry and Commerce Press, 1st edition, June 2020, p. 349.

<sup>15</sup> Decision on Administrative Punishment by the State Administration for Market Regulation - State Administration of Municipal Supervision [2021] No. 28.

<sup>16</sup> Administrative Judgment of the Supreme People's Court, (2021) Supreme Intellectual Property Final No. 880.

<sup>17</sup> See Article 15 of the China's AML.

## ***A. Export Cartel Exemption***

Article 20(6) of the Antimonopoly Law provides that the prohibition of monopoly agreements may not be applied "in order to safeguard legitimate interests in foreign trade and foreign economic cooperation." However, considering that antimonopoly laws around the world have the same effect of extraterritorial application as China's Antitrust Law,<sup>18</sup> the exemption of export cartels from the Antimonopoly Law would not be of substantial help to Chinese exporters because they could be considered as violating foreign anti-monopoly laws in the country of export even if they do not violate the Chinese Antimonopoly Law. For example, in 2005, four Chinese pharmaceutical companies exporting vitamins were subject to antitrust litigation in the United States. Therefore, the Antimonopoly Law should repeal this provision.

## ***B. Exemption From the Exercise of Intellectual Property Rights***

Article 68 of the Antimonopoly Law provides that "the exercise of intellectual property rights by an operator in accordance with the laws and administrative regulations relating to intellectual property rights shall not be subject to this Law." This provision is, on the one hand, in conflict with legal practice, as cases in which the exercise of intellectual property rights has been found to be in violation of the antitrust law are common at home and abroad. On the other hand, this provision is also inconsistent with the basic antitrust principles governing the exercise of intellectual property rights in countries around the world. For example, the Guidelines on Technology Transfer Agreements issued by the European Commission clearly states two basic principles of the relationship between intellectual property law and competition law: first, exclusive rights to intellectual property rights do not mean that intellectual property rights can be exempted from competition law; and second, there is no inherent conflict between intellectual property law and EU competition law, because their purposes are both to promote consumer welfare and efficient allocation of resources.<sup>19</sup> With today's highly developed information technology, various standards, both de jure and de facto, can easily lead to the dominance of rights holders in certain technology markets. While the state should protect IPRs on the one hand, it should also prevent monopolistic rent-seeking activities of rights holders, and therefore IPR protection cannot exclude the application of competition law.

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<sup>18</sup> See Article 2 of the China's AML.

<sup>19</sup> EU Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/OJ C 8, para. 7.





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