

## EXECUTIVE OVERVIEW – Role of Competition Law & Digitisation

DIGITALEUROPE welcomes the opportunity to provide input on the intersection of competition law and digitisation. We look forward to discussing our points with DG COMPETITION and its advisors during the conference of January 2019.

Globally, digital players—through their platforms, algorithms, apps, and other offerings—have fostered competition and cross-border commerce, enlarging the range of goods and services available to millions of EU citizens and providing consumers with access to valuable information.

Our submission provides input on the role of competition law in promoting open, competitive markets, innovation and competitive prices (often for free) in the supply of digital services. Although DG COMPETITION’s questions appear to focus largely on companies whose primary business activity is the supply of online services, we observe that digital technologies are becoming pervasive across the economy, transforming firms in many traditional sectors of the economy into digital businesses, and that this process is accelerating with the adoption of artificial intelligence (AI), connected devices, mobile and cloud computing, and other innovations. We applaud efforts by regulators to remain attentive to abuse, but caution against mission-creep and unnecessary intervention in these markets lest such action diminish competition or innovation in the longer term or limit European success stories and technology deployment. In this perspective, particular attention should be paid to the way in which other regulators would be acting, as activities are most often worldwide in scope.

As explained in more detail below, we urge DG COMPETITION to take into account the following factors in their evaluation of the three topics that will be addressed in the January conference:

### **Competition, Data, Privacy, and AI**

Markets in which firms make extensive use of data are generally characterised by significant investments in innovation, fierce competition, and broad consumer choice. This data is generally ubiquitous, non-rivalrous, and easily substitutable with other data sets. It is therefore unlikely that a firm holds market power based on the quantity of data it holds; . Data sharing, data access arrangements, and data pooling also rarely raise competition concerns; since generally these practices promote competition by enabling multiple firms to access large data sets more efficiently. Forced sharing of data, by contrast, may deter innovation and competition—for instance, by reducing firms’ incentives to collect and organize the datasets needed to “train” innovative AI services.

Privacy concerns arising from the use of data should be addressed primarily through the application of privacy rules. While privacy considerations may be relevant in assessing consumer harm in an antitrust case, competition enforcers should tread carefully before imposing privacy-related remedies on firms.

The term “artificial intelligence” encompasses a huge breadth of technologies, uses, and applications that serve many different purposes and vastly different customer segments. Given this diversity of offerings, there is no basis in competition law to impose new rules on “AI technology” generally. Furthermore, given the large number of both established firms and new entrants offering AI solutions, competition regulators should adopt a high bar before intervening in order to incentivize AI development.

### Digital Platforms' Market Power

Digital platforms facilitate cross-border transactions, commerce and information exchange, bridging geographic and language divides that would otherwise constitute major hurdles for European consumers and businesses. Yet the term “digital platform” does not have a standard definition; it is used to describe a number of different organisational models that connect diverse groups of people or companies, both online and offline. Despite their diversity, digital platforms compete fiercely with each other for the attention of consumers.

It is a misconception that market power is more commonly associated with digital platforms than other businesses. The business models used by “digital platforms” often create significant efficiencies that a detrimental application of competition law could limit or penalise firms for generating them. Also, not all digital platforms are associated with network effects, and the tendency of consumers and businesses to multi-home can significantly weaken or even remove such effects. The relationship of any such networks effects with market power must be assessed on a case-by-case basis and backed up by data. Competition policy and enforcement should only address empirically proven concerns, and regulators should intervene only where there is clear evidence of harm to competition or consumers, all the more so as this directly relates to stakeholders ability to innovate

### Preserving Digital Innovation Through Competition Policy

Although competition enforcers may have legitimate grounds to consider rates of innovation in evaluating markets, intervention based on the potential adverse effects on innovation of a given transaction or course of conduct can be fraught with risk and should be considered with utmost care due to the often inevitable uncertainties of the assessment. Over intervention, in particular risks discouraging innovation, especially in digital markets characterised by rapid technological development and high rates of innovation.

Network effects and economies of scale are not problematic in themselves. Network effects can have huge benefits for consumers, while economies of scale drive down costs and therefore generate pro-competitive efficiencies. Also, digital markets in which network effects exist often are characterized by fierce competition for the market, which can spur innovation and provide enormous consumer benefits—potentially much greater than the benefits generated by incremental increases in competition within the market. Efficiencies should in any event be granted significantly more attention in competition law assessments.

Investments in innovation, and the pace of innovation, are if anything greater in digital markets than in other markets. Moreover, innovation in digital markets seldom forecloses similar innovation by competitors. Accordingly, there are strong grounds to believe that a transaction or course of conduct in digital markets is no more likely to result in “loss-of-innovation” harms in digital markets than in other markets. These observations apply with equal force to competitive concerns that may arise in connection with the acquisition of start-ups by established firms.

## **PANEL 1: COMPETITION, DATA, PRIVACY, AND AI**

Markets for digital products and services that make use of data, including most AI technologies, are generally characterised by significant investments in innovation, fierce competition, global markets, and broad consumer choice. All of these are hallmarks of competitive markets, which suggests that competitively meaningful “bottlenecks” to data are rare—and, to the extent they exist, are isolated to niche

markets and settings. A closer look at the characteristics of these markets further suggests that limits on access to data are generally unlikely to raise competition concerns.

**a) Substitutability**

Because digital products and services generate so much data at such little cost, data today is ubiquitous. It is also non-rivalrous, meaning that its use by one firm does not impede or devalue its use by others. Moreover, the fact that one firm collects and uses data in a particular way generally does not prevent other firms from collecting or using the same data in unlimited different ways. AI and machine learning, for instance, typically use combinations of data sets from many different sources, where one or several data sets can be substituted by other sets of data. Indeed, much of the value that AI offers is the ability to gain insights by combining and analysing many diverse data sets in different ways.

In practice, unique data sets that are not substitutable and cannot be replicated by other market players are rare.

**b) Data quality & quantity**

Product improvements in the world of ubiquitous data is not solely driven by the amount of data an organisation collects, but also by the quality of the data and how that organisation uses such data. Rather, it is usually based on a vast variety of factors, and more relevant than the amount of data may be the way the data is analysed, the purposes for which it is analysed, the type of services provided, etc. Innovation plays a key role in these respects and also has significant positive impacts on the overall and consumer welfare.

**c) Data sharing, data access, data pooling**

On the basis of the above, it can be concluded that the use of data is unlikely to limit competition; on the contrary, such practices in many cases may promote competition by enabling multiple firms to access large data sets more efficiently.

In some cases, such practices would also be regulated through existing rules, e.g., around intellectual property and privacy protection.

Consequently, forced data access or data sharing requirements imposed under competition law and from a regulatory standpoint risk to have a negative impact on competition and innovation. Such requirements could, for instance, create disincentives for firms to collect and organize the datasets needed to “train” innovative AI services, thus deterring investment and competition in these downstream markets. Notably, both the GDPR and the proposed Regulation on the free flow of non-personal data include provisions on data portability. Regulators should allow time to assess the impact of these new rules on the market. Non-competition considerations like the protection of privacy should not guide competition enforcement. The Commission upheld this approach in the Facebook/WhatsApp merger decision by stating that “[a]ny privacy-related concerns flowing from the increased concentration of data [...] do not fall within the scope of the EU competition law rules but within the scope of EU data protection rules”.<sup>1</sup>

It should also be taken into account that forced data access or data sharing requirements can conflict with data privacy rules. Given the wide definition of “personal data” under the GDPR, this may present a serious challenge to the compelled disclosure of many types of datasets.

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<sup>1</sup> Commission decision in Case M.7217 *Facebook/WhatsApp* (2014), para. 164. Available at: [http://ec.europa.eu/competition/mergers/cases/decisions/m7217\\_20141003\\_20310\\_3962132\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf)

#### d) Conclusion

Given the nature of data and AI technology, data bottlenecks are theoretically possible but in practice should be extremely rare. Indeed, given that so much of the data that fuels digital technologies today is ubiquitous, non-rivalrous, and usually substitutable, the question itself may be misleading. Because identifying possible data bottlenecks in advance is probably impossible, given the characteristics of quickly developing markets and continuous innovation, this argues against ex-ante regulation and weighs in favour of strictly applied, ex-post competition law.

Forced data sharing should only be considered in extreme cases, where access to a unique, irreplaceable data set is necessary for competition. This should not equate to data or IP appropriation, but should reflect a genuine business need, as in the Gaz de France case brought by the French Competition Authority. Vastly more often, innovation in respect of data will have significant positive impacts on competition and consumer welfare. These and other types of efficiencies brought about by such activities should fully be taken into account in a competition law assessment.

Current competition rules are therefore equipped to deal with such scenarios and would enable competition regulators to grant access to data on a case-by-case basis if the relevant requirements are met under the well-established standards. We do not see any reason to depart from the existing analytical framework.

#### **In what ways should privacy concerns serve as an element of the competition assessment?**

Privacy concerns should be addressed primarily through the application of privacy rules. Privacy rules aim at protecting fundamental rights as well as facilitating the free flow of data in the internal market. While privacy can potentially be a competition issue in merger cases where the company being acquired has stronger privacy practices than the acquirer, this generally does not raise true competition concerns unless the merger would result in weaker privacy practices across the market.

Moreover, there are no clear examples of market failure in the provision of privacy protections to consumers; on the contrary, there is strong evidence that digital firms today actively compete with regard to the strength of their privacy practices. This suggests that competition enforcers should tread carefully before imposing privacy-related remedies on firms, particularly in abuse of dominance cases. Competition authorities should also resist demands to become a super regulator defining how much data a company can collect. Such actions could create a blockage to innovation.

#### **How do we ensure that AI technology is as competitive as possible?**

As has been argued above, it is vital to first clearly define relevant markets, establish market power, and then identify clear market failures before intervening in nascent and innovative markets such as AI. Given the large number of both established firms and new entrants offering AI solutions, competition regulators should adopt a high bar for regulatory intervention around AI technology, its uses and applications, in order to protect strong incentives to innovate.

The manner in which these questions are raised for this Panel gives the impression that “AI technology” is a single, clearly defined offering. In practice, however, AI technology encompasses a huge breadth of technologies, uses and applications that serve many different purposes and vastly different customer segments. Given this diversity of offerings, there is no basis in competition law to impose new rules with regard to “AI technology” generally. The European Commission has started exploring policies and tools

that may help ensure that Europe becomes a leader on AI adoption and development. The question of how we can ensure a competitive AI market should be addressed in the framework of these discussions unless there are specific cases of market actors' practices that raise competition law concerns.

## PANEL 2 : DIGITAL PLATFORMS' MARKET POWER

### Introduction

Businesses come and go, particularly in the area of technology. Seemingly unassailable tech giants such as Xerox, Kodak, Motorola, Myspace, AOL, or Yahoo are but a few instructive examples of "platforms" that were once leaders in a particular space but were toppled by innovative upstarts. The internet economy is very dynamic as barriers to market entry are often low and services are highly susceptible to changes in technology (*e.g.*, mobile, cloud, machine learning, augmented reality) and user preferences. Experience shows that success in an activity attracts new entrants and new investments by existing firms; successful firms may stumble and be displaced.

In Europe, digital platforms facilitate cross-border transactions, commerce and information exchange, bridging geographic and language divides that would otherwise constitute major hurdles for European consumers and businesses. In several cases, such services have stepped in where regulation has failed to facilitate efficient cross-border commerce and thus constitute a key element in achieving a truly Digital Single Market matching the goals and ideals of the EU. Moreover, digital platforms are already subject to extensive EU and Member State regulation in areas such as consumer protection, cyber security, data protection, secure payments, and anti-money laundering.

In order to assess the market power of a business operating an online platform, the market definition constructed by the authorities needs to be realistic, based on economic analysis, and forward-looking. It should take into account all relevant sources of competition including innovation and market entry, and not be based on artificial considerations such as a particular choice of business model. Economically-based market definitions are particularly important for services that are evolving rapidly due to technological change, as over-enforcement based on artificially narrow market definitions could have the unintended and damaging effects of chilling innovation, new entry, and competition. One must focus on the constraints firms face, and not the business model they employ. Overly broad definitions may harm consumers by curtailing the benefits brought by efficient firms, discouraging innovation and entry, and by introducing tremendous uncertainty into the legal and regulatory landscape that a would-be innovator would face.

In evaluating the economic evidence and other facts relating to digital platforms, we urge DG COMPETITION to bear in mind the observations that follow.

### No standard definition of a 'platform'

There is no standard definition of a 'platform'. People often use the term to describe a number of different organisational models that bring together diverse groups of people or companies. Platforms are not limited to the internet but exist in the offline world as well: for example, the yellow pages and video game consoles are familiar off-line examples of platforms. Similarly, offline media such as newspapers and radio and TV channels are platforms.

Common references to 'digital platforms' typically include a wide range of different models such as business-to-business, business-to-consumer, or even peer-to-peer (consumer-to-consumer) platforms.

While some are globally active, many are smaller and only focus on local or regional markets. Examples include:

- application stores such as Google Play or Microsoft Store;
- content sharing platforms such as Dailymotion, Vimeo, YouTube, Flickr, Instagram, or Pinterest;
- e-commerce platforms such as Allegro, Zalando, Wish, Alibaba, Amazon, or eBay;
- online travel booking pages such as BlaBlaCar, Airbnb, Booking.com, or Expedia;
- search and comparison platforms such as Seznam, Bing, Google, TripAdvisor, or Kelkoo;
- social media platforms such as Seznam, Facebook, Twitter, or LinkedIn.

Despite their diversity, many digital platforms compete fiercely with each other. Overlapping in terms of business models and looking to enter different markets, all are vying for the attention of both consumers and business users. In order to succeed, platforms provide a wealth of information, advice, tools, and data to their business users to help them be successful and offer great services and products. At the same time, they have rules and policies in place to ensure that their ecosystem performs and is safe for consumers.

### **Digital Platforms are not a ‘Market’**

It is misguided to presume, as the Panel 2 question does, that market power is a characteristic of digital ‘platforms’; market power is no more inherent for digital platforms than for businesses in general. Platforms are not a market segment, but a way of organising business. As noted above, such business models often create significant efficiencies for both firms and consumers. It would be a mistake for competition law to seek to limit such efficiencies, or to penalize firms for generating them. Entrenched competitors sometimes complain about innovative business models that threaten their position and may seek to co-opt competition law to target these more-efficient competitors, but authorities should avoid the temptation to use competition law in this manner.

Innovative businesses models having characteristics of “digital platforms” have emerged across a wide range of sectors, including communications, transport, gaming, retail, information, and entertainment, and any analysis of them needs to be specific to the situation—just as authorities do not talk about the possible market power of one-sided business models, but rather of individual firms.

In setting out the panel themes for its conference in January 2019, DG Competition also has questioned whether the interests of platforms and platform users are aligned. In response to this, it is important to point out that all platforms serve multiple sets of users, and therefore must strike a balance to optimise for all users. Businesses in highly competitive segments, irrespective of their choice of business model, would not thrive if they did not serve the interests of their users. The suggestion in the Panel 2 questions that digital platforms do not do so is therefore counter intuitive.

Many businesses with two sets of customers face a wide set of competitors, including firms that are not organised as platforms. Examples include Voip applications competing against traditional telephony services, and ride-sharing apps competing against hierarchically organised transport services. These companies operate in a wide variety of different industries and face market and other constraints that vary dramatically.

### **Network Effects**

The organisational model of a business does not necessarily mean there are network effects. For many businesses with multiple customer bases, there are no such effects. Further, where they exist, they are of

different degrees of strength and may not bestow market power. Any assertion that network effects adversely affect the competitive dynamics in an industry should be backed up by data specific to the situation and not be the subject of a general claim (see generally our comments in response to Panel 3, below).

Moreover, any network effects that do exist will likely not be stable as market dynamics evolve. ‘Platform’ users on both sides may ‘multi-home’—*i.e.*, use multiple applications and services simultaneously—and the degree of multi-homing will vary depending on the service in question. As an example, a consumer may have several communications or shopping applications on their smartphone at the same time. Some of these will be organised as two-sided markets and others not. Further, business users of two-sided markets also often use multiple services: drivers, for instance, may offer their services through multiple apps at the same time and can switch multiple times within a single day without any constraint. Much of the economic theory on network effects relies on the assumption that users do not multi-home. Once you consider that this assumption is not generally applicable to all digital platforms, many of the potential competition concerns fall away. A case-by-case approach is therefore necessary.

### **Innovation in new products and services**

Companies in many sectors that are organised with different models may seek to attract customers by adding a new product or service to their portfolio; this is not unique to ‘digital platforms’. Competition policy and enforcement should only address empirically proven concerns about leveraging and exploitation of market power, and regulators should intervene only where there is clear evidence of harm to competition or consumers.

### **The Role of Competition Law in Addressing Any Concerns**

Competition law and enforcement should remain focussed on consumer outcomes and resist any temptation to become involved in other policy debates around, for instance, data protection or industrial policy, which are best addressed by regulatory and policy functions dedicated to those areas. Although, for example, privacy considerations might have a role to play in assessing consumer harm, more generally involving broader policy goals into competition policy may lead to uncertainty in competition enforcement and regulation, which may ultimately deter competitive entry and innovation.

## **PANEL 3: PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY**

### **Introductory remarks**

As the unstated assumption of the Panel 3 questions suggests, innovation can be an important marker of whether a market is competitive. Generally speaking, incentives to invest in innovation tend to diminish as the level of competition decreases (but may also be sub-optimal in markets characterized by high levels of competition and low profit margins). Competition enforcers therefore may have legitimate grounds to consider rates of innovation in evaluating markets and should consider the potential impact of their actions (or inaction) on incentives for innovation.

That said, innovation can be tricky to measure. Innovation is not an asset, and it can be difficult to identify and quantify, especially *ex ante*. Indeed, absent compelling indirect evidence (e.g., internal documents on

the potential impact of the parties' own plans), it is often only ex post that one can measure the value of an innovation, or even whether something is in fact "innovative" in a competitively meaningful sense.

Accordingly, regulatory intervention based on the potential adverse effects on innovation of a given transaction or course of conduct can be fraught with risk. Over intervention in particular risks discouraging innovation and therefore should be avoided. This is especially true in digital markets, many of which are characterized by rapid technological development and high rates of innovation.

Maintaining broad alignment with other leading competition agencies also weighs in favour of a cautious approach. Competition enforcers in other major markets do not impose unique tools or standards on digital markets when assessing a transaction's (or course of conduct's) impact on innovation, but instead treat innovation as one of many factors they consider when assessing a transaction's potential impact on competition and consumers.

If EU enforcers were to adopt more interventionist rules in this area, this could create tremendous confusion and legal uncertainty, especially for digital businesses that operate both inside and outside the EU (as will be true of most digital businesses with sufficient market share to bring them within the purview of EU competition law). While we recognize the legitimate desire of competition enforcers to ensure that their actions take account of new technologies and fast-moving markets, this should be done only on the basis of a clearly identified problem that cannot be solved using traditional competition-law analysis and tools. In our view, there is no evidence today that such problems exist, especially with respect to rates of innovation in digital markets.

#### ***Do network effects, economies of scale and 'copycat' products impede innovation?***

Network effects and economies of scale are simply characteristics of some markets. They are not, even in broad directional terms, problematic in themselves. Quite the contrary: Network effects can have huge benefits for consumers, while economies of scale drive down costs and therefore generate pro-competitive efficiencies. Thus, the most obvious consequence of network effects and economies of scale is consumer benefit.

While it is true that network effects can have impacts on competition, the nature and scale of such impacts, and their significance for competition-law analysis, are highly fact dependent. For instance, in some cases, network effects—and their efficiency or other benefits—may level off after a firm reaches a certain scale; in other cases, they may continue to grow as scale increases. Likewise, the extent to which network effects may constitute a meaningful barrier to entry varies significantly from one market to the next. This is particularly true in digital markets, where things like multi-homing, data portability, and other factors can significantly impact the competitive impacts of network effects.

Also, while network effects may in some cases diminish the level of competition within a market, digital markets in which network effects exist often are characterized by fierce competition for the market. Competition for markets can spur tremendous levels of innovation and provide enormous consumer benefits—potentially much greater than the benefits generated by incremental increases in competition within the market. Thus, while regulatory intervention to limit network effects might make it easier for competitors to compete within certain markets, it could reduce incentives to innovate by firms that seek to compete for the market.

Economies of scale generate efficiencies and therefore almost always are pro-competitive. While significant economies of scale may create barriers to entry, especially for smaller firms, this is a characteristic of many markets outside the digital realm—e.g., producers of tangible products may need to invest billions in factories and develop extended and costly supply chains for raw materials. In our view, there is no evidence that economies of scale present unique competitive concerns in digital markets, or that any concerns that do arise cannot be adequately addressed using existing competition law analysis and tools.

Moreover, recent advances in digital technologies and market developments suggest that economies of scale are actually diminishing in importance as a potential barrier to entry across many markets. The advent of cloud computing, online services, AI-as-a-service, and other advances have drastically reduced barriers to entry for start-up firms, enabling them to compete effectively against established providers in many markets, despite having far fewer assets.

Accordingly, any rule imposing heightened competition scrutiny or standards on economies of scale in transactions or conduct involving digital markets would be ill-advised, particularly in the absence of compelling evidence that such heightened scrutiny would materially promote innovations that increase competition or benefit consumers. Instead, regulators should focus on economic and factual evidence in evaluating extent to which economies of scale create material barriers to entry.

Finally, we do not perceive any policy justification for innovation-based regulatory intervention on the basis of “copycat products.” Innovations in digital markets are protected by a range of intellectual property (IP) laws (copyright, patent, trade secret). The reliance on these regimes varies significantly from industry to industry and market to market, making it impossible to make accurate generalizations on the extent to which “copycat products” may impede innovation. Moreover, if a copycat product does not violate IP laws, its supply might well be pro-competitive—e.g., by driving down costs. To the extent copycat products deter innovation, this is something that should generally be addressed under IP law, not competition law.

***In digital merger cases, is there scope to apply theories of harm based on a loss of innovation and/or loss of ‘potential competition’ more often?***

The empirical evidence shows that investments in innovation, and the pace of innovation, are if anything greater in digital markets than in other markets. Thus, the claim that digital markets might warrant greater intervention or stricter competition law standards in order to spur innovation seems without basis in fact. Moreover, innovation in digital markets (at least outside of the device realm) seldom forecloses similar innovation by competitors.

Accordingly, there are strong grounds to believe that a transaction or course of conduct in digital markets is no more likely to result in “loss-of-innovation” harms in digital markets than in other markets. Nothing suggests that existing analytic tools need to be revised, or that intervention needs to increase.

These observations apply with equal force to competitive concerns that may arise in connection with the acquisition of start-ups by established (or even dominant) firms. Many start-ups are created only to be bought at some later stage. These firms may bring competitively valuable innovations to market without any clear path to commercialisation, and it may not even be possible to achieve a return on investment absent an acquisition that would combine the innovation with other technologies or services. Mergers and

acquisitions of start-ups are therefore a necessary element of this development cycle and generally pro-competitive by bringing valuable innovations to market and making them commercially viable.

***Would a focus on innovation require updating our analytical tools?***

As noted above, innovation is one of many factors that competition enforcers can and already do take into account in evaluating the potential impact on competition of a transaction, or the market foreclosure effects of a challenged course of conduct. Although digital markets are unique in some respects from non-digital markets, these differences tend to be favourable to innovation, in the sense that a transaction or course of conduct may in fact pose fewer threats to innovation in digital markets than in other markets (all other things being equal).

Rather than impose unique rules or constraints on digital markets with respect to innovation, competition enforcers should rely on robust economic analysis and a deep factual understanding of relevant markets to evaluate threats to competition, including reduced incentives to invest in innovation. While it is possible that a firm might seek to engage in a transaction in order to stifle a competitive threat posed by a rival innovation (or engage in a course of conduct to stifle innovation by others that pose a competitive threat), experience suggests that such scenarios are rare. Where such cases exist, history shows that existing analytic tools are up to the task of addressing these cases and that competition enforcers using them are perfectly capable of dealing with such cases.

## Final observations

DIGITALEUROPE remains concerned about the implications of any new competition rules intended solely for digital firms. Our paper offers insights where we believe more thought is needed. Our members and national trade associations stand ready to discuss this topic with the appointed advisors and DG Competition. We encourage the European Commission to ensure that industry is invited to engage and contribute to the January conference on these issues, and to maintain an open dialogue with DIGITALEUROPE.

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## ABOUT DIGITALEUROPE

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