

# The Current G20 Taxation Agenda: Compliance, Accountability and Legitimacy

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**Dries Lesage** – Professor, Department of Political Science, Ghent Institute for International Studies, Ghent University, Universiteitstraat 8, B-9000 Ghent, Belgium; E-mail: [dries.lesage@ugent.be](mailto:dries.lesage@ugent.be)

*This article analyzes the recent Group of 20 (G20) initiatives on taxation, more precisely on base erosion and profit shifting (BEPS) in the area of corporate taxation and the new G20 norm of automatic exchange of information (AEOI) with regard to foreign accounts. After reflecting on the special relationship between the G20 and the Organisation for Economic Co-operation and Development (OECD), the discussion proceeds to the issues of compliance, accountability and legitimacy. In terms of compliance, the G20 is still in the phase of delivering as a group on recent promises regarding global standard setting. Compliance to these standards by G20 members (and third countries) is expected to start in the coming years. As to accountability, the G20 and OECD already have ample experience with the peer-review process and public reporting on the G20/OECD standard of information exchange upon request. For AEOI and BEPS, the OECD will be designated as the prime mechanism to monitor compliance as well. Both initiatives, which are attempts at universal governance, suffer from legitimacy issues because the G20 and OECD exclude most developing countries. Moreover, the policy outputs are not necessarily adjusted to the needs and interests of developing countries. In recent years, both the G20 and the OECD have attempted to address this issue through institutional fixes, extensive consultations with developing countries and modifications at the level of content.*

**Key words:** G20; tax havens; international tax cooperation, base erosion and profit shifting

## Introduction

“Profits should be taxed where functions driving the profits are performed and where value is created,” the Group of 20 (G20) finance ministers (2013) ambitiously stated in July 2013. The Organisation for Economic Co-operation and Development [OECD 2014d, p. 4], in turn, has made the following observation: “The era of bank secrecy is really coming to an end and this is a key achievement of the G20.” Taxation seems to be a G20 success story. This article analyzes the ongoing G20 taxation work from the angle of compliance, accountability and legitimacy.

It focuses on the two main topics of the current G20 tax agenda: the initiative against base erosion and profit shifting (BEPS) and information exchange for tax purposes. BEPS pertains to the taxation of multinational corporations (MNCs) in a globalizing world. The initiative tries to tackle the geographical mismatch between where profits have economically been generated and where they come to the surface for tax purposes. The exchange of information is aimed at making taxpayers’ overseas financial information, such as bank accounts, transparent for the competent tax authorities. The practices of banking secrecy in several countries present a major stumbling block, however. In both instances, offshore financial centres or tax havens are believed to play a negative role.

Since the G20’s key taxation decisions are relatively fresh, and implementation on the ground has yet to start, for the purposes of this article compliance is defined as the way the G20 as a group lives up to its promises and translates those promises into concrete action. Account-

ability refers to the practices of evaluating compliance and the ways this evaluation is made public. As to legitimacy, this article focuses mostly on issues of input legitimacy, i.e., the question of whether all stakeholders have a substantial and fair say in decision-making. In what follows, a few observations will be made on the significance of the special G20-OECD relationship. This architecture is crucial to understand aspects of compliance, accountability and legitimacy. In subsequent sections, BEPS and the exchange of information will be discussed from the viewpoint of these three notions.

## The G20 – OECD Relationship

The key to understanding G20 taxation activities is the special G20-OECD relationship. In the global taxation story, both bodies have been valorizing their respective comparative advantages. The OECD consists of 34 industrialized member states. The G20 convenes 19 major economies and the European Union, including the BRICS as well as other non-OECD members.<sup>1</sup> The OECD is the world's leading knowledge centre on international tax issues, with a tradition of working with non-members. While the OECD has a rather technocratic outlook, the G20 leaders and finance ministers form a much more political body, and therefore constitutes a more effective negotiating forum. Thanks to its top-level, very public and visual character, the G20 is well placed to confer political impetus on a difficult and delicate agenda such as taxation, including through the group's influence and pressure on the wider international community.

The G20 format has also proved to be very helpful in strengthening the link between the non-OECD rising powers and OECD tax policy. On the one hand, the rising powers benefit from the OECD's expertise. Through the G20, on the other, the OECD involves the rising powers in its standards. Even though the OECD extensively prepares the G20 tax discussions, the G20 membership decides politically on the policy orientations. This way, the rising powers share ownership of the process. This would not be the case with OECD outreach alone toward these non-members, which would weaken the multilateral effort. In due course, the non-OECD G20 members have come to accept the leading intellectual and operational role of the OECD. The political backing by the G20 (and the Group of Eight [G8]) has greatly helped the OECD to consolidate its role as the central operational leader of the regime complex of global taxation governance [Lesage and Van de Graaf, 2013].

Nonetheless, the Group of Seven/Eight (G7/8) is also very active in the field of global tax governance. Taxation was one of the central themes of the United Kingdom's presidency of the G8 in Lough Erne in 2013. But instead of competing with the G20, with regard to the G20/OECD tax agenda, the G7/8 lends its high-level political support, and infuses it with its own emphases and suggestions in a non-conflictual manner. An example is the idea of a detailed template for country-by-country reporting by multinational corporations (MNCs), proposed at the Lough Erne Summit [G8, 2013]. Such a template now features as an outcome of the OECD/G20 Base Erosion and Profit Shifting Project [OECD 2014c].

Combined, the G20 and OECD still have a restricted membership, despite their ambitions for universal governance. To tackle this problem, both bodies have collaborated in strengthening or creating additional forums to involve outsiders. With regard to BEPS, 44 countries are deliberating on an equal footing. Those countries are the OECD members and the non-OECD G20 members plus Colombia and Latvia as the "BEPS associates." This is still a limited group,

<sup>1</sup> The BRICS consists of Brazil, Russia, India, China and South Africa. The other G20 countries that are not members of the OECD are Argentina, Indonesia, and Saudi Arabia. The remaining members of the G20 are Australia, Canada, France, Germany, Italy, Japan, Korea, Mexico, Turkey, United Kingdom and United States, plus the European Union.

but through regional and global ad hoc conferences, more than 80 developing and other non-OECD/non-G20 countries have provided input. This happened under the aegis of the G20 Development Working Group [OECD 2014d]. With regard to the exchange of information, the G20 helped to upgrade the already existing Global Forum on Transparency and Exchange of Information for Tax Purposes, by adopting all G20 members and encouraging developing countries to join [Lesage and Van de Graaf, 2013]. The Global Forum is a standing body that structurally helps to address the poor representativeness of the G20 and OECD.

This architecture is complemented by the G20 and OECD's respective forums to cover the burgeoning agenda of taxation and development. Tax policy is an important track of the Development Working Group. This body frequently consults with representatives of developing countries and regional organizations. However, it is only composed of G20 members. The OECD runs the Task Force on Taxation and Development, for which its tax and development departments join forces. It also involves developing countries, business and civil society. These vehicles, which often need to liaise, are integral parts of the G20/OECD tax architecture, and help organize G20 and OECD outreach to the rest of the world – but without giving non-G20 developing countries an equal seat at the table. This happens in a context where the G20 and OECD have politically marginalized the United Nations Committee of Expert on International Cooperation in Tax Matters [Lesage, McNair and Vermeiren, 2010].

## Base Erosion and Profit Shifting (BEPS)

According to the OECD, “base erosion and profit shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in tax rules to make profits ‘disappear’ for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid” [OECD 2014e]. Through technological innovations and political decisions making cross-border transactions easier, globalization has indeed given MNCs ample opportunities to exploit differences in tax policy across jurisdictions. Profits as well as activities are frequently shifted to lower-tax jurisdictions, such as tax havens or countries with aggressive tax incentives. One technique is the manipulation of cross-border transfer prices – prices for goods and services traded between entities of the same MNC – for tax purposes.

### **Compliance**

Right from the start, the G20 and OECD have worked together on BEPS. At the 2012 Los Cabos summit, G20 [2012] leaders referred to the issue, indicating an intention to follow with great interest the work of the OECD in this area. In February 2013, the OECD [2013] presented an extensive report on BEPS to the G20 finance ministers in Moscow. The ministers then vowed to take collective action and tasked the OECD with developing a comprehensive action plan [G20 finance ministers and central bank governors, 2013]. In July 2013, the OECD [2013] submitted its action plan, which sets out 15 actions to be implemented over the next two years. The OECD split the agenda into lists of 2014 and 2015 deliverables. Importantly, the BEPS project has been conducted by the members of the OECD, the G20 and a few other BEPS partners (44 in total), participating on an equal footing.

In terms of concrete output, the action plan is geared at developing common standards, model treaty provisions, guidelines and recommendations – as is often the case with OECD policy. Topics include issues typical of the digital economy, abuse of transfer pricing, abuse of deductible financial costs, reporting requirements on tax planning strategies, countries' aggressive tax incentives, abuse of tax treaties and abuse of regulatory differences between countries.

In September 2014 in Cairns, Australia, the OECD presented to the G20 finance ministers its output on the seven 2014 deliverables. These outcomes had been approved by the 44 participating countries [OECD 2014d]. Highlights included a feasibility study for a multilateral instrument on BEPS as well as a template for country-by-country reporting, which introduces and standardizes reporting by MNCs per tax jurisdiction on revenues, profits, taxes paid, assets and payroll. Such reporting will enable tax officials to see the big picture of MNCs' operations and tax planning strategies [OECD 2014c]. However, countries are not called upon to render these reports public, as asked by civil society organizations [G20 Development Working Group, 2014].

The feasibility study concluded that a multilateral instrument on BEPS is both desirable and possible. Rather than insisting on the (cumbersome) renegotiation of more than 3,000 individual bilateral tax treaties to align them with the BEPS initiative, a new multilateral treaty could coexist with participating countries' bilateral treaties, with the automatic effect of superseding the treaties on the elements it aims to modify or add. This would be a bold innovation in international tax governance, but according to the OECD and G20, several precedents exist in other international regimes. An OECD/G20-sponsored global conference in 2015 will launch the multilateral instrument [OECD 2014b]. Apart from these innovations, the 2014 deliverables include common standards on tax and digital economy, hybrid mismatch arrangements (a form of abuse of international regulatory differences), harmful tax incentives, abuse of tax treaties and transfer pricing issues. Several aspects of the 2014 outcomes are still works in progress with built-in deadlines and follow-up mechanisms. Some of them may be modified or further developed in line with related 2015 deliverables. The OECD stresses the importance of a comprehensive and holistic approach [OECD 2014d].

### ***Accountability***

As happened in the past – as with the OECD's monitoring of countries' harmful tax practices since 1998 – the G20 will most probably rely on the OECD apparatus to review national implementation after 2015. The intriguing innovation here is that the associated countries (the non-OECD members of the G20 plus Colombia and Latvia) may also be brought into the orbit of the OECD peer-review mechanism, notably for a corporate tax agenda that is quite comprehensive. Yet G20 decisions on the follow-up are still lacking. It is almost unthinkable, though, that no review process will be set up, and that this review would be conducted in a forum not related to the OECD. In the framework of the Global Forum, the non-OECD G20 members already agreed to a peer-review process, which is an important precedent for BEPS.

### ***Legitimacy***

A major legitimacy issue arises when the G20 and the OECD engage in drafting global tax rules, as both exclude the majority of developing (and other countries) as formal members. The only universal negotiating forum with a legacy on taxation is the United Nations, but the UN Committee of Experts on International Cooperation in Tax Matters has been sidelined by the OECD membership [Lesage, McNair and Vermeiren, 2010]. For example, the envisaged 2015 conference on a multilateral instrument is to be a G20/OECD event and not a UN one. The G20 and OECD definitely possess the lead in agenda setting. Civil society continues to consider this as a major problem [BEPS Monitoring Group, 2014]. Nevertheless, the G20 and OECD have shown a sensitivity for the specific problems of low-income and other developing countries concerning BEPS. In 2013, the G20 leaders tasked the Development Working Group to report on this dimension [G20, 2013].

For this task, the Developing Working Group commissioned reports from the OECD, and subsequently endorsed those reports. The reports were based on inputs from developing countries at regional and global conferences, as well as the IMF, World Bank, UN and regional organizations. Still, the recommendations remain relatively vague. Most of them are situated at a meta level, calling for taking into account the special needs of developing countries, intensifying dialogue with them and strengthening capacity building on BEPS. The general topic of capacity building and technical assistance is an integral part of the tax and development agenda of the Development Working Group [2014], and not specific to BEPS.

According to civil society organizations and a number of experts, however, a fundamental problem is that the BEPS initiative tries to amend the established international regime for corporate taxation technically rather than overhaul it. The current OECD-dominated regime is based on an arm's-length principle, considering cross-border transactions between entities of the same multinational group for tax purposes as if they occurred between independent parties. Therefore, the exact pricing of these transactions (i.e., transfer pricing) is vital to tax authorities, but also open to manipulation by MNCs. Transfer pricing can be extremely technical and complex, particularly for intangible items (such as research, royalties and goodwill), often putting national tax authorities at a disadvantage. This is all the more problematic for developing countries. An alternative – requiring a complete rethinking of the international corporate tax regime – could be the apportionment of a MNC's taxable income across jurisdictions according to a formula based on elements such as revenues, assets and payroll per country (i.e., “unitary taxation”). This approach would render the determination of taxable profits per country easier [Rixen, 2011]. But the OECD maintains the arm's-length approach, which now also underpins the BEPS initiative [BEPS Monitoring Group, 2014]. This problem points to the link between input and output legitimacy. Developing countries have no ownership of the longstanding OECD approach, whereas they are most vulnerable to transfer mispricing.

## The Automatic Exchange of Information

The other major tax issue in a globalized world is the combination of free capital movements and existence of jurisdictions (either countries or dependent territories) that apply forms of secrecy for foreigners' bank accounts. One way to overcome this challenge is exchange of information among jurisdictions, so that they can apply the preferred “residence principle” to taxing natural persons: an individual is supposed to pay taxes on his or her worldwide income in the state where that person resides [Genschel and Schwarz, 2011]. The EU, the G7 and the OECD have considered tax-inspired capital flight to tax havens or secrecy jurisdictions as a serious issue requiring joint action since the 1980s [Sharman, 2006].

From this awareness the OECD initiative has emerged to promote “information exchange upon request” as a global norm. This implies that when a jurisdiction sends a well-motivated information request on a specific taxpayer's banking details to another jurisdiction, the latter has to provide that information, regardless of its bank secrecy rules. In 2000 the Global Forum was set up to find a consensus among OECD countries and tax havens about the implementation of the standard. However, lacking strong incentives or threats, these consultations did not produce the desired outcomes [Sharman, 2006]. It took the global financial crisis of 2008–09 and the tax scandals involving financial institutions in Switzerland and Liechtenstein around the same period, which angered Germany, France and the United States, for the international community to step up joint efforts against tax evasion.

## **Compliance**

An intense collaboration between the G20 and OECD emerged during the global financial crisis. One of the most visible initiatives was the release at the April 2009 London Summit of white, grey and black lists of jurisdictions according to countries' level of commitment to exchanging information upon request [OECD 2009]. This initiative was intended to pressure tax havens to comply quickly, which most did – even though talk about “sanctions” never translated into actual details, let alone formal G20 language. However, after a few years G20 and OECD members began to understand that the standard for information exchange upon request was inherently weak. Most illicit tax-driven financial flows would remain under the radar. Moreover, in several tax havens practical and legal obstacles (or tactics) against full compliance came to the surface [Meinzer, 2012].

Based on these evaluations, the G20 chose to embrace the norm of automatic exchange of information (AEOI) under its 2012 Mexican presidency. The G20 members would “continue to lead by example in implementing this practice” [G20, 2012]. This was a fundamental policy shift, although the EU already applied automatic information exchange among its members. A parallel evolution, in response to tax scandals, was the adoption of the Foreign Account Tax Compliance Act (FATCA) in the United States in 2010. FATCA compels foreign financial institutions to disclose automatically details on U.S. citizens' bank accounts. Non-complying financial institutions face a 30% withholding tax on all U.S.-source income and other sanctions. FATCA is unilateral legislation, as it does not commit U.S. financial institutions to do the same for other countries. For practical reasons, dozens of countries concluded intergovernmental treaties with the United States committing themselves to collect the required information from their banks [Morse, 2012]. This way, FATCA spectacularly broke through several countries' longstanding banking secrecy. Most FATCA treaties provide for AEOI on a reciprocal basis. Thus, EU and U.S. leadership helped pave the way for automatic information exchange in the G20 as a superior norm to information exchange upon request.

Between the 2012 Los Cabos and 2013 St. Petersburg summits, G20 finance ministers became more outspoken in favour of implementing AEOI among G20 members and promoting it as the global norm. In consultation with the G20, the OECD worked on a global standard. At the September 2013 St. Petersburg Summit, the leaders committed to implement AEOI for their countries by the end of 2015 (which was later postponed slightly). The OECD delivered a draft common reporting standard by February 2014, which was fully endorsed by the G20 finance ministers [2014] in Sydney. It thus received the support of the non-OECD rising powers in the G20. At that moment, the point of gravity moved to the OECD and its Global Forum, which frantically went after as many country commitments as possible.

A milestone was on 6 May 2014, when all 34 OECD members (including Switzerland) as well as non-members such as China, Brazil and Singapore endorsed the Declaration on Automatic Exchange of Information in Tax Matters. By doing this, those countries signed up to the principle of AEOI, with explicit relevance to the new OECD standard [OECD 2014a]. There are three caveats, however, putting these countries' determination for “swift implementation” into perspective: 1) they did not set a timetable; 2) they committed to AEOI on a reciprocal basis, rendering things more complicated; and 3) they called for safeguards for the confidential treatment of exchanged data, which is a legitimate concern, but one that may also hinder implementation.

Another achievement was the signature of the Multilateral Competent Authority Agreement by 51 jurisdictions in Berlin on 29 October 2014. This happened at a gathering of the Global Forum. This was the first multilateral agreement beyond the EU for the actual imple-

mentation of AEOI. However, under the agreement jurisdictions can still choose who to exchange information with. On principle, the exchange will be reciprocal, although the standard is open to instances of non-reciprocal exchange (but this will depend on jurisdictions' particular wishes) [Global Forum 2014c].

This group of early adopters committed to start exchanging information from 2017 onward. It includes several G20 and EU members, as well as the Cayman Islands, British Virgin Islands, Liechtenstein, Luxembourg, Isle of Man, Guernsey and Jersey. Notable absentees are China, Hong Kong, the United States, Switzerland, Russia and United Arab Emirates. However, they expressed a commitment to implement the standard by 2017 or 2018. The United States will likely stick to its own FATCA standard. At the time of writing, no commitment has been registered from Bahrain, Cook Islands, Nauru, Panama, and Vanuatu. Also absent for the time being are least developed countries [Global Forum 2014a].

As things stand now, the commitment process is a voluntary matter. Neither the OECD nor the G20 have a policy of compelling members or third countries to join and to implement loyally. At first glance, such a policy would seem at odds with respect for national sovereignty. But, at the same time, non-complying countries actually undermine the tax sovereignty of other countries willing to tax the overseas financial income of their own citizens subject to the residence principle. The idea of sanctions against non-complying countries was floated in the past – mostly informally. Now the G20 and OECD – through the Global Forum as main consultation vehicle – are trying to convince countries across the globe on a consensual basis. The United States' unilateral FATCA legislation – to which the (financial institutions of the) concerned tax havens are supposed to adapt anyway – is helpful in this regard. The trend is definitely moving toward AEOI, and several tax havens are already among the early adopters. A plausible hypothesis is that the G20 and OECD are betting on the successful voluntary commitment process, and refraining from using tough language that might disturb this process. Depending on how compliance evolves, threat with sanctions certainly remains a possibility in the future. In this regard the accountability mechanism is crucial.

### ***Accountability***

Taxation policy and particularly tax information exchange are highly technical matters. Several issues can occur at the level of implementation. Countries can be faced with a lack of capacity to comply. Others can deploy deliberate tactics to hinder the smooth exchange of information. After all, these policies go against the interests of financial institutions and their clients, as well as the governments of the jurisdictions where they operate. Therefore, a proper accountability mechanism to monitor and report on compliance is vital to the output legitimacy, the effectiveness of the G20's efforts.

With the backing of both the G7/8 and G20, the OECD-led Global Forum has been appointed as the accountability mechanism for the G20/OECD policies on information exchange. The Global Forum currently has 123 members, including the OECD and G20 countries, all relevant offshore financial centers, and several developing countries. For the information exchange upon request standard, the Global Forum oversaw a comprehensive peer-review procedure consisting of two components. The first part investigated the legal and regulatory frameworks of all members. The second examined the actual implementation. These reviews resulted in public reports, and brought to light a number of issues concerning several jurisdictions [Global Forum 2014d]. This work has now receded slightly into the shadows, due to the rise of the more ambitious AEOI as the gold standard for information exchange. But this process has nonetheless shown how the G20 can delegate the task of accountability to a multilateral institution, rather than setting up its own structure.

Building on this experience, at St. Petersburg the G20 [2013] leaders stated: “We also ask the Global Forum to establish a mechanism to monitor and review the implementation of the new global standard on automatic exchange of information.” Notwithstanding the growing commitment to the global standard in words, the implementation phase promises to be fraught with challenges. Without any framework for enforcement or sanctions, little prevents tax havens from dragging their feet in implementation, or being selective about which aspects and with which jurisdictions they cooperate.

### ***Legitimacy***

A potential major legitimacy problem for both the G20 and OECD in the area of information exchange is limited membership. This problem is partly remedied by the existence of the Global Forum, which focuses on information exchange, and is explicitly open to all countries. Even though discussions are held on an equal footing, it is obvious that the OECD, backed by the G7/8 and G20, has the lead in terms of agenda setting. In the current global governance architecture, the OECD-driven Global Forum has no competitor. The OECD’s expertise is not contested.

However, several serious issues arise concerning developing countries and AEOI. Does the chosen institutional format really matter? At the core of the issues are differences in capacity and interests across developed and developing countries and tax havens. These issues risk compromising the output legitimacy of G20/OECD policies. Because of gaps in capacity, poor countries might have difficulties in reciprocating the exchange of information as well as in keeping received data confidential. These problems can constitute a reason or alibi for particular rich countries and tax havens not to exchange information with those developing countries. Given the fact that collecting data for the sake of reciprocity is burdensome for poor countries, whereas they are the victims of the tax flight to tax havens, a case can be made to exempt them from reciprocity. But this is not the path that the OECD is following [Knobel and Meinzer, 2014]. An additional challenge is processing received data.

At St. Petersburg, the G20 [2013] recognized that AEOI might pose difficulties for developing countries, and tasked the Development Working Group to work with the Global Forum to develop a road map in order to enable developing countries to reap the benefits of AEOI. The road map – delivered by the Development Working Group in August 2014 – implies that developing countries ultimately implement the AEOI standard in full, including reciprocity. It proposes an incremental approach, with tasks for developing countries, the Global Forum, and G20 and developed countries. The document provides an overview of things that need to be done in order to be ready for AEOI. Other important elements are efforts to encourage a large number of developing countries to become members of the Global Forum, pilot projects between volunteering developing and developed countries (with the possibility of temporary reciprocity) and a call for technical assistance from rich countries (among other things, in the area of technology for data processing and data confidentiality) [Global Forum 2014b].

## **Conclusions**

The G20/OECD BEPS and AEOI initiatives are landmark achievements in the area of global taxation governance. The G20 – OECD tandem has proved remarkably efficient in keeping momentum and involving a significant part of the world community. Comprehensive policy and regulatory frameworks are being built that, if properly implemented by national states, could fix a great deal of today’s globalization-related and development-relevant tax issues. Still, with

regard to BEPS, the question remains whether the fundamental issues have not been circumvented. As for AEOI, success will depend on the full implementation by all significant financial centres and the tax havens in particular. As long as the commitment process remains highly voluntary – countries are free to commit or not, they can cherry-pick the partners with which they will exchange information and there are no mechanisms to enforce implementation – the oft-repeated phrase that “the era of banking secrecy is over” is premature. Ultimately, success for BEPS and AEOI will depend not only on faithful implementation but also on the capacity of developing countries to reap the benefits. BEPS and AEOI are major test cases for the input and output legitimacy of bodies – the G20 and the OECD – that aspire to steer global governance, but that exclude poor countries as full members. Many people in the world will continue to consider this state of affairs to be unjust, and will advocate for a strengthened UN Tax Committee instead. In any case, accountability mechanism for these two agendas will remain vital to the G20/OECD agenda. The OECD machinery has already demonstrated it has this capacity, and new agreements on this aspect are expected soon.

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