

Opinion on notifications for prior checking received from the Data Protection Officers of certain EU agencies concerning the "*processing of administrative inquiries and disciplinary proceedings*".

Brussels, 22 June 2011 (Case 2010-0752)

1. Procedure

On 4 September 2008, the European Data Protection Supervisor (EDPS) sent a letter to all EU agencies (agencies) announcing the new procedure for ex post prior checking analysis regarding common procedures within the agencies.

On 26 April 2010, the EDPS sent "*Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European Union institutions and bodies*" (EDPS Guidelines) to all EU agencies. These agencies were requested to submit their notifications regarding their procedures on administrative inquiries and disciplinary proceedings (AI&DP) accompanied by a cover letter from the Data Protection Officer (DPO) highlighting the specific aspects vis-à-vis the EDPS Guidelines. The deadline to submit notifications was September 2010. Five agencies submitted notifications and cover letters:

- European Agency for the Management of Operational Cooperation at the External Borders (**FRONTEX**),
- European Chemicals Agency (**ECHA**),
- European Foundation for the Improvement of Living and Working Conditions (**EUROFOUND**),
- European Food Safety Authority (**EFSA**),
- European Environment Agency (**EEA**).

The last revised notification was sent by the **EEA** on 18 February 2011.

Some agencies informed the EDPS that they had not set up any procedures yet on AI&DP, while they are in the process of negotiations with the Investigation and Disciplinary Office of the Commission for a possible cooperation to use its services¹. Some agencies stated that they had adopted the relevant Commission Decision (C(2004) 1588 of 28 April 2004 by analogy², whereas some others informed the EDPS that they are in process of finalising their implementing rules and notifications³. In all scenarios, the EDPS reminds these agencies that they should notify the EDPS prior to the processing of such data in the frame of AI&DP, failing that they would be in breach of Regulation (EC) 45/2001 (the Regulation).

¹ **SJU, EAHC, REA, ERCEA, and TEN-T**

² **ERA, ERCEA, REA, EAHC and TEN-T**

³ **EASA, EACI, ECDC, CFCA, EMA, EFSA and EU-OSHA**

The draft Opinion was sent to the five DPOs of the agencies concerned for comments on 27 May 2011. The DPOs' comments were received on 10 June 2011.

2. Legal aspects

2.1. Prior checking

The processing operations under examination cover the processing of data in the framework of AI&DP. The data subjects may be permanent staff, temporary agents, contractual agents, national experts and trainees who may be subject to an investigation carried out by the five agencies, but also any other person whose data may be processed in the context of an AI&DP, such as a whistleblower, a victim or a witness. The processing operations are subject to prior-checking on two different legal grounds: they may concern data relating to suspected offences, criminal convictions or security measures within the meaning of Article 27(2)(a) of the Regulation. Furthermore, an AI&DP is intended to evaluate personal aspects relating to data subjects, including in particular their conduct in light of Article 27(2)(b) of the Regulation.

The EDPS analysed each agency's practice with reference to the data protection principles of the Regulation and evaluated whether each agency followed the EDPS Guidelines or not. In view of the similarities of the procedures, and of similarities presented by some agencies in terms of data protection practices, the EDPS decided to examine all the notifications in the same context and issue one Joint Opinion. In this Joint Opinion the EDPS highlights any practice which does not seem to be in conformity with the principles of the Regulation or the EDPS Guidelines and provides the agency(ies) concerned with relevant recommendations. Some examples of good practice are also highlighted, where appropriate.

According to Article 27(4) of the Regulation, the EDPS will issue his Opinion within two months following receipt of the notification. Due to the fact that the last notification was submitted to the EDPS on 18 February 2011, the EDPS considers this date as the date of receipt for all notifications. The prior-checking procedure was suspended for a total of 34 days for further information from the DPOs and for 14 days for their comments. The Joint Opinion must therefore be issued no later than the 23 June 2011.

2.2. Lawfulness of the processing

Personal data may only be processed if lawful grounds can be found in Article 5 of the Regulation. The processing operations under examination fall under Article 5 (a), pursuant to which data may be processed if the processing is "*necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed*".

It follows that the first issue under Article 5(a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing of personal data is necessary for the performance of a task carried out in the public interest.

Relevant lawful grounds in the Treaty or other legal instruments

The legal basis for carrying out an AI&DP can be found in Article 86 and Annex IX to the Staff Regulations as well as in Articles 49, 50 and 119 of the Conditions of Employment of

Other Servants. Furthermore, Article 30 of Annex IX to the Staff Regulations provides that each EU institution/body/agency will, if it sees fit, adopt implementing arrangements.

The EDPS notes that **FRONTEX**, **ECHA** and **EEA** submitted draft implementing rules (draft rules) on the conduct of their AI&DP in conformity with Article 30 of Annex IX to the Staff Regulations and the EDPS Guidelines. These agencies should take into consideration all the EDPS recommendations and provide the EDPS with a copy of their draft rules revised accordingly.

EFSA adopted a Decision on implementing rules in December 2010. Any recommendations provided by the EDPS in the present Opinion regarding **EFSA** should be duly implemented.

EUROFOUND has provided the EDPS with a procedure note on the AI&DP. The EDPS recommends that the agency also adopts its own specific implementing rules in this field in the light of the EDPS Guidelines including all the EDPS recommendations in the present Opinion.

The EDPS underlines that these rules not only complement the procedures in this field, but also establish with legal certainty and clarity the data processing undertaken in such cases and the data protection safeguards implemented in this respect.

Necessary to perform a task carried out in the public interest

In considering whether the processing of personal data in the framework of AI&DP fulfils the second condition of Article 5 of the Regulation, the EDPS points out that the processing is based on a task to be performed in the public interest as provided for in the Staff Regulations; it can therefore be considered as necessary for compliance purpose with the Staff Regulations. The performance of an AI or DP necessarily implies the processing of personal data. It follows that the processing of personal data related to AI&DP carried out by the agencies under analysis is necessary to perform a task carried out in the public interest according to Article 5 (a) of the Regulation.

2.3. Processing of special categories of data

According to Article 10(1) of the Regulation, processing of personal data revealing **racial or ethnic origin, political Opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life**, are prohibited unless an exception can be found in Article 10 (2). In certain exceptional cases, the processing of such sensitive data could also be based on reasons of substantial public interest or a decision of the EDPS in accordance with Article 10(4). In addition, the processing of data relating to offences, criminal convictions or security measures may be carried out only under the conditions provided in Article 10(5).

The DPO of **FRONTEX** pointed out in his cover letter that Article 24(1) of the draft rules on AI&DP only makes reference to the exception under Article 10(2) of the Regulation and that the other two provisions will be included in the draft. The EDPS therefore recommends that **FRONTEX** makes explicit reference to both exceptions for processing sensitive data under Articles 10(4) and 10(5), as they have been analysed in the EDPS Guidelines.

In the light of the EDPS Guidelines, the EDPS recommends that **ECHA** (in Article 3(2) of its implementing rules on the conduct of AI&DP) and **EEA** (in its draft rules), add a sentence which states that the investigators responsible for an AI&DP shall avoid processing any

sensitive data unless it is strictly authorised by any of the exceptions provided in Article 10 (2), (4) or (5) of the Regulation.

Furthermore, in the case of **EEA**, the last point of paragraph 4 of the privacy statement related to Article 10 of the Regulation seems to be misleading. The EDPS therefore recommends that **EEA** re-formulates the information regarding the exceptional grounds for processing under Articles 10(2), (4) or (5) in the light of the EDPS Guidelines.

EUROFOUND makes reference only to Article 10(2) of the Regulation in the note to be signed by the investigator appointed for an administrative inquiry. The EDPS recommends that Articles 10(4) and 10(5) are also indicated in the note addressed to the investigator as well as in step 4 of the procedure note.

2.4. Data Quality

Adequacy, relevance and proportionality

According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*".

Although certain standard administrative data, such as name and date of birth, are always present in the investigation files, the EDPS acknowledges that there is no systematic rule regarding the nature of data which can be included in administrative or disciplinary investigation files; the precise content of a file will vary according to the purpose of the particular case.

However, guarantees should be established in order to respect the principle of data quality.

FRONTEX should add in Article 22 of its draft rules that the principles of necessity and proportionality should be applied to the reports on AI&DP as well as to the Disciplinary reports (Article 15 of Annex IX to the Staff Regulations).

The principles of necessity and proportionality evoked in Article 3(2) of the implementing rules of **ECHA** in the framework of an AI&DP should also be applicable to the Disciplinary Board reports. **ECHA** should accordingly complete Article 3(2) of its rules with this recommendation.

EUROFOUND and **EFSA** could add to the note to be signed by the data subject being investigated as well as to the note to be signed by the investigator that the principles of necessity and proportionality under Article 4(1)(c) of the Regulation are applicable not only to the reports on AI &DP, but also to the Disciplinary Board reports.

The EDPS recommends that **EEA** explicitly makes reference to Article 4(1)(c) of the Regulation; the agency should namely indicate in the "*declaration of confidentiality and absence of conflict of interests*" to be signed by the appointed investigator(s), that the latter are instructed to collect only necessary and proportionate data to the purpose of the investigation. It should also be pointed out that, the principles of necessity and proportionality should not only be applicable to the reports on administrative or disciplinary inquiries, but also to the Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which*

they were collected or for which they are further processed, are erased or rectified". Most of the agencies seem to have taken some necessary measures in view of keeping their data subjects' data accurate and complete; it is namely indicated in their draft rules or privacy statement that data subjects may receive a copy of the conclusions of the investigation and, on request, of all documents directly linked to the allegations made, subject to the preservation of the legitimate interests of thirds parties. In this way, data subjects are indeed in a position to verify that their data are accurate and up to date in conformity with Article 4(1) (d) of the Regulation.

2.5. Conservation of data

Article 4(1)(e) of the Regulation outlines the principle that *"personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed"*.

Disciplinary data in personal files

The EDPS Guidelines highlighted the importance of adopting a maximum retention period for the storage of the disciplinary related data in the personal file, for instance the same length as the storage period for the disciplinary files or otherwise provide reasons why a longer period is necessary. Most of the agencies adopted the position which is recommended in the EDPS Guidelines.

Nevertheless, **FRONTEX**, should provide more clarifications about the retention of disciplinary related data in the personal file. The EDPS recommends that the agency in Article 28(3) of its draft rules could specify, in line with the EDPS Guidelines, that a copy of the administrative or disciplinary decision will be stored in the personal file taking into account the provisions of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data.

Moreover, both **FRONTEX** (in Article 28(3) of its draft rules) and **EUROFOUND** (in step 21 of its procedure note) should indicate that on the basis of Article 22 of Annex IX to the Staff Regulations, when the Appointing Authority decides to close the case without imposing any disciplinary penalty, there should be no traces of the acquittal decision in the personal file, unless the staff member requests so.

Disciplinary files

With regard to the retention period of disciplinary files, the EDPS in his Guidelines recommended that an adequate retention period is set up taking into account the time limit for appeal and the principle under Article 4(1)(e) of the Regulation.

All agencies adopted a 20-year retention period for all data in the disciplinary file related to a procedure on AI&DP. As concerns data of administrative inquiries without a disciplinary follow-up, most agencies adopted a 5-year retention period. Both retention periods seem reasonable and necessary for the purpose for which they are collected in the light of Article 4(1)(e) of the Regulation as well as possible appeals⁴. They are also in line with the EDPS recommendations in other similar prior-checking Opinions.

EEA should adopt a retention period in cases where an inquiry is closed without a disciplinary follow-up and indicate this period in its privacy statement.

2.6. Transfer of data

The processing covered by Article 7(1) is the transfer of personal data within or to other EU institutions or bodies "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

Internal transfer of data within the agency and between the agency and other EU institutions/bodies:

In view of complying with Article 7(3) of the Regulation, the EDPS recommends **FRONTEX** and **ECHA** to prepare an internal note or a declaration to be signed by all the internal recipients in the framework of an AI&DP; the note or declaration should explicitly remind them of their obligation not to use the data received for any other purpose than the one for which they were transmitted.

EUROFOUND and **EFSA** prepared notes addressed to the investigator being appointed in an administrative inquiry. The same notes should also be used in the case of a disciplinary proceeding, thus **EUROFOUND** and **EFSA** are invited to indicate this on the note. Furthermore, considering that there are other internal recipients in the framework of an AI&DP within the agency and between the agency and other EU institutions/bodies, the EDPS recommends that **EUROFOUND** and **EFSA** prepare similar notes to be signed by all the other internal recipients under Article 7(1), in conformity with the principle of Article 7(3) of the Regulation.

EEA prepared a "declaration of confidentiality and absence of conflict of interests" to be signed by the members of the investigation team and of the disciplinary board. This declaration satisfies the principle of Article 7(3) of the Regulation. The EDPS recommends that similar declarations are also signed by all the internal recipients of administrative and disciplinary related data within the **EEA** and between the agency and other EU institutions/bodies, in the light of the EDPS Guidelines.

External transfer

Article 8

In the cases where there is a possible transfer of data to national authorities, the EDPS recommends that **ECHA**, **EUROFOUND**, **EFSA** and **EEA** adopt specific guidance and set up a justified and documented procedure in the light of the EDPS Guidelines. In particular, when the recipients are subject to Directive 95/46/EC, the necessity test should be established under Article 8 of the Regulation:

- if data are transferred at the request of a national authority, the latter should establish the "necessity" for the transfer;
- if data are transferred on the sole initiative of the agencies concerned, it will be for the latter to establish the "necessity" for the transfer in a reasoned decision.

In the case of **EFSA**, there might be a possibility of appointing an external expert as one of the members of the investigation panel. In principle, these recipients are subject to the national law adopted for the implementation of Directive 95/46/EC. If it is the case, the transfer of data to the external experts may be considered to be necessary under Article 8(b) of the Regulation, since their independent Opinion is sought on a specific issue depending on the needs of a particular AI&DP. Furthermore, in view of the tasks performed by the recipients -external experts- there is in principle no reason to assume that the data subjects'

legitimate interests might be prejudiced. However, the EDPS recommends that the conditions set forth in Article 8 (b) of the Regulation are carefully considered on a case by case basis before disclosing any personal data to an external expert (see further, point 3.10 on confidentiality and security requirements under Article 23 of the Regulation).

Article 9

Moreover, **ECHA**, **EUROFOUND**, **EFSA** and **EEA** should also take into account in its guidance and procedure that, in cases where AI&DP data are transferred to recipients in countries that have not implemented a comprehensive data protection framework for judicial activities, Article 9 should apply. In such cases, the Council of Europe Convention 108 is applicable to judicial authorities, which is to be considered as an adequate legal instrument for intra EU transfers in the field of judicial activities.

2.7. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

Right of access

As it was highlighted in the EDPS Guidelines, in the course of an AI&DP, data subjects are granted full access to the documents in their disciplinary file, as well as to the copies of the final decisions on an AI&DP stored in their personal file. This access may be limited if it is justified that any restrictions under Article 20 of the Regulation should apply. Most of the agencies have been clear with this general principle in their draft rules.

Nevertheless, as it was pointed out in the EDPS Guidelines, special attention should also be made to other possible data subjects, apart from the persons being investigated; namely to other persons indirectly involved in an AI&DP such as whistleblowers, informants or witnesses. In this regard, the EDPS recommends that **FRONTEX** (in Article 26 of its draft rules), **ECHA** (in the note on the right to information), **EUROFOUND** (in its procedure note), **EFSA** (in its implementing rules) and **EEA** (in paragraph 7 of the privacy statement) underline that any exceptions to the right of access of data subjects should be strictly applied in light of the necessity of such a restriction and they should be balanced in relation to the right of defence. In particular, all five agencies should add that:

- in the case of **whistleblowers, informants or witnesses**, any restriction to the right of access of these persons should be in line with Article 20 of the Regulation;
- the identity of whistleblowers should be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

Right of rectification

ECHA should indicate, in its note on the right to information, some means of guaranteeing the right of rectification in the context of an AI&DP. The agency should for instance mention that data subjects are allowed to add their comments and to include a recourse or appeal decision in their files. Where applicable, data subjects may further ask that the decision is replaced or removed from the file.

2.8. Information to be given to the data subject

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation. In the present case, the data processed in the framework of an AI&DP are partly provided by the data subject and partly by various parties involved (investigators, Directors, OLAF, etc).

Privacy policy note

FRONTEX has included most of the elements listed in Articles 11 and 12 of the Regulation in PART IV of its draft rules entitled "data protection". Nevertheless, in Article 27 of its draft rules, **FRONTEX** should add that:

- the right to information can be restricted in certain cases if it is necessary in light of Article 20 (1) (a-e) and
- the controller should inform the data subject of the principal reasons on which the application of the restriction is based as well as of his/her right to have recourse to the EDPS under Article 20 (3). Any decision for any deferral to this provision should be taken strictly on a case by case basis.

ECHA should complete the third paragraph of the note to information by stating that the right to information can be restricted under all the sub-paragraphs of Article 20(1) from (a) to (e) if it is necessary, and not only in light of Article 20 (1) (a) and 20 (1) (c) of the Regulation, as it is mentioned. Moreover, where it is indicated that "*the data subject shall be informed of the principal reasons for applying such restrictions*", **ECHA** should add that data subjects may have the right to have recourse to the EDPS under Article 20(3) of the Regulation.

With regard to **EUROFOUND** and **EFSA**, the EDPS underlines that the two similar notes prepared by the agencies, one addressed to the data subject and the other one to the investigator being appointed are not adequate enough to meet the requirements under Articles 11 and 12 of the Regulation. Consequently, the EDPS recommends that **EUROFOUND** and **EFSA** prepare a privacy policy note which should include clearly all the information listed in Articles 11 and 12 of the Regulation regarding the processing of the data subjects' data within the framework of an AI&DP. In addition, **EUROFOUND** and **EFSA** should indicate in the privacy policy note, as the EDPS Guidelines outline, that the right of information may be restricted if it is necessary in light of Article 20(1)(a-e) of the Regulation and when it is the case, the controller should inform the data subjects of the principal reasons of the restriction as well as of their right to have recourse to the EDPS under Article 20 (3) of the Regulation.

EEA has provided a detailed privacy statement including all the information under Articles 11 and 12 of the Regulation. The EDPS however finds the sentence "*the right of access and rectification may be restricted in terms of Articles 20(1)(a) and (c) of the Regulation*" in paragraph 7 of the privacy statement incomplete. **EEA** should therefore add that the rights of access and rectification may be restricted within the limits of the possible exemptions set out in Article 20 of the Regulation and the right of information may be restricted in certain cases in light of Article 20(1) (a-e) of the Regulation.

2.9. Security

[...]

2.10. Processing data on behalf of controllers

Article 2 (e) of the Regulation states that *"processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller"*. Article 23 of the Regulation stipulates on one hand, the role of the processor and on the other hand, the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensuring compliance with those measures.

In case **EFSA** and **EUROFOUND** need external experts to be part of the investigation panel in the framework of an AI&DP, these experts are considered as processors, since they will process data on behalf of the agencies in view of giving their independent view about an AI&DP. Both agencies should therefore guarantee that Article 23 is respected. This means that **EFSA** and **EUROFOUND** should prepare an act which binds each processor to the agency concerned (the controller). This act should stipulate the following two elements:

- the processor shall act only on instructions from the controller (Article 23(2)(a)) and
- the obligations set out in Articles 21 (related to confidentiality of the processing) and Article 22 (related to the security of the processing) of the Regulation should be incumbent on the processor, unless the processor is already subject to a national law of one of the Member States; in such case the processor should be bound by the obligations with regard to confidentiality and security by virtue of Article 16 or Article 17(3), second indent of the Directive 95/46/EC (Article 23(2)(b)).

Consequently, the EDPS recommends that **EFSA** and **EUROFOUND** prepare draft templates of a legal act for their processors-external experts, in conformity with the requirements of Article 23 of the Regulation.

2.11. Traffic data and confidentiality of electronic communications

Traffic data

If an agency considers that it is really necessary to process data relating to Internet connections and the use of e-mail or the telephone in the course of an AI&DP, it would have to do so in accordance with Articles 37 and 20 of the Regulation.

The EDPS notes that the DPO of **ECHA** in her cover letter pointed out that traffic data will only be collected in exceptional circumstances where no other less invasive method could be used and after the DPO is consulted on the matter. This is indeed a very good practice, that all DPOs are consulted before any traffic data are collected and the recommendations outlined in the EDPS Guidelines should be carefully followed. The EDPS considers appropriate that this should be included in the draft rules by all agencies.

In particular, **EUROFOUND** should add in step 5 of the procedure note that, before approval of the Director, the DPO of the agency should first be consulted on the necessity of processing traffic data in a specific situation. **EFSA** should add the same information in paragraph 5 of

the note to be signed by the investigator. **FRONTEX** and **EEA** should mention this practice in their draft rules.

Confidentiality of electronic communications

The issue of confidentiality of communications has not been raised by any of the five agencies. Should the need arise to gain access to electronic communications in the course of an AI&DP, the principles mentioned in the EDPS Guidelines must be respected rigorously. The EDPS therefore considers that all the actors involved in an AI&DP should be aware of these principles and recommends that each agency includes these principles in its draft rules or in a note addressed to all potential actors.

Furthermore, as concerns interception of electronic communications, **EUROFOUND** has explicitly stated in the note to be signed by the investigator, that interception of voice communication is not to be used as part of the investigation.

As it was pointed out in the EDPS Guidelines, the EDPS will carry out a further reflexion regarding the legal basis of interception of electronic communications in the near future. Nevertheless, **FRONTEX**, **ECHA**, **EFSA** and **EEA** should -prior to any initiative- inform the EDPS whether in the framework of an AI&DP they may intercept telephone calls or e-mails in order to obtain the information required for the investigation. If it is the case, the EDPS recommends that these agencies -in addition to that prior information- should indicate this possibility in their draft rules and set up a procedure with particular emphasis to the legal basis of the tapping of a voice communication or e-mail and to the possibility of doing this without a judicial warrant or authorisation.

Conclusion

The EDPS Guidelines have been a useful tool for agencies to reflect on how the data protection principles of the Regulation have an impact on the processing of data in the framework of an AI&DP and set up their own procedures.

The next step forward is that all the specific recommendations highlighted by the EDPS in the present Opinion are fully implemented by each of the five agencies concerned. In light of the EDPS' recent policy paper on monitoring and ensuring compliance with the Regulation⁵, the controller of each agency concerned is now invited to adopt specific and concrete measures, namely revise its draft rules, adopt documents, modify or add provisions and principles etc. as underlined by the EDPS in this Opinion. To facilitate the follow-up, each agency should therefore provide the EDPS with all relevant documents within three months of issuing the Joint Opinion.

Done at Brussels, 22 June 2011

⁵ Monitoring and Ensuring Compliance with Regulation (EC) 45/2001 Policy paper, Brussels, 13 December 2010, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/PolicyP/10-12-13_PP_Compliance_EN.pdf

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