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**Gloss on the judgment of the Court of Appeal in Gdańsk  
of 9 August 2019, II Aka 60/19**

THESIS

There are no grounds for eliminating a period of incarceration from the description of the act of participation in an organised criminal group (Article 258 § 1 Criminal Code), especially if, once released, the offender relapses into crime within the same organised criminal group, since such conduct clearly establishes the offender's sustained membership in the group. For participation in an organised criminal group is a sustained offence and lasts as long as the membership in the group persists, without requiring the offender to perform any other criminal activities. This offence is also a formal one, which means that passive membership alone is sufficient, without prohibited acts being completed.

COMMENTARY

In its judgment of 9 August 2019, II Aka 60/19,<sup>1</sup> the Court of Appeal in Gdańsk addressed several important aspects of the interpretation of Article 258 of the Criminal Code (hereinafter CC). The Court's views, in general, merit approval, though some appear to require greater precision.

Firstly, the Court of Appeal in Gdańsk notes that the offence defined in Article 258 § 1 CC is a formal one and, as such, 'passive membership alone is sufficient, without prohibited acts being completed.' In this part of its thesis the Court of Appeal in Gdańsk repeats the view – as already set out in court decisions and not fully precise

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<sup>1</sup> Kwartalnik Sądowy Apelacji Gdańskiej 2019/3–4/208.

– that also the so-called passive participation in a criminal group or association is criminalised as a result of this being a crime defined by formal conduct. This is how the matter was elaborated by the Court of Appeal in Lublin, whose reasoning set out in the judgment of 21 November 2013 emphasizes: ‘The nature of the criminal offence under Article 258 § 1 CC is formal, and the features of membership in an organised criminal group are fulfilled by acceding to it and remaining in its structure; hence, passive membership alone without any other prohibited acts being completed is sufficient.’<sup>2</sup>

The formal nature of the criminal offence of participating in an organised group or association intended to commit crimes is not, in principle, met with any significant doubt in the literature.<sup>3</sup> However, the formal nature of this act is only determined by the fact that its commission does not require any specific consequence to be brought about by the offender’s conduct (the crime for the commission of which a group or association were established certainly is not such a consequence);<sup>4</sup> this, however, does not in any way resolve the matter whether participation in the prohibited criminal structure may be either active or passive, as opposed to only active participation being the case. For active participation may not be identified with the commission of criminal offences as part of the group or association (although such activity will undoubtedly be evidence of such active participation) and refers only to whether the offender does anything more than accede to the group or association and declare willingness to act for it. Thus, an offender who ‘only’ engages in activities intended to facilitate the existence of a group or association, for example, by acting as the cook and gunsmith at the group’s hideout, also takes active participation in the

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<sup>2</sup> II AKa 199/13, LEX No. 1419069.

<sup>3</sup> See e.g. M. Mozgawa, [in:] *Kodeks karny. Komentarz*, M. Mozgawa (ed.), Warszawa 2019, p. 844; A. Herzog, [in:] *Kodeks karny. Komentarz*, R.A. Stefański (ed.), Warszawa 2018, p. 1646; A. Lach, [in:] *Kodeks karny. Komentarz*, V. Konarska-Wrzošek (ed.), Warszawa 2018, p. 1173.

<sup>4</sup> See e.g. the Supreme Court judgment of 28 March 2017, the reasoning of which emphasizes the following: ‘The act under Article 258 § 1 CC is called a formal offence, and the commission of a criminal offence being a form of implementation of the group’s purpose is not a consequential element of this crime. Under Article 258 § 1 CC, the classification of the offender’s conduct does not turn the criminal offences committed as part of the group into included offences. On the contrary, crimes committed within the group should be classified according to those provisions the elements of which the offender’s conduct fulfils’ (WK 3/17, LEX No. 2261760). The Court of Appeal in Łódź expressed a similar view in the reasoning for its judgment of 26 March 2013, also in the context of a concurrence of legal provisions and concurrence of criminal offences: ‘Under Article 258 § 1 CC, the classification of the offender’s conduct does not turn the criminal offences committed as part of the group into included offences, as manifestations of the achievement of the group’s purpose. On the contrary, crimes committed within the group should be classified according to those provisions the elements of which the offender’s conduct fulfils, and, even though undertaken as part of the group and as manifestation of the achievement of its purpose, without a cumulative classification with Article 258 § 1 CC. For this last misconduct is not one defined by consequence; hence, the commission of a criminal offence being a form of achievement of the group’s purpose is not a consequence of this crime. The wrongful state, once created, persists as long as membership in the group does, and it does not require engagement in any other criminal activities. It is, therefore, a criminal offence which remains in an actual concurrence with other criminal offences committed during membership in the group, including ones committed as part of the achievement of the group’s purpose.’ (II AKa 258/12, LEX No. 1321966).

group (if, of course, the subject-side elements are also met, that is the offender self-identifies as a member of the group and is regarded as such by its other members).

This does not change the fact that one ought to accept the interpretation, according to which Article 258 CC also criminalises the passive participation in a group or association. This, however, is a consequence of its correct interpretation and not of the nature of the crime as a formal offence. First of all, Article 254 in Chapter XXXII clearly indicates that only 'active participation' is criminalised by that provision; *a contrario*, one can infer that the absence of such a reservation in Article 258 CC means that the provision criminalises any type of participation in criminal structures.<sup>5</sup> Linguistic construction also appears to support this interpretation. When participating in some sort of organisation or association, either purely formal membership (expressed by a membership declaration) or participation showing clear activity is possible. It is worth noting, however, that the analysed problem appears to be of no greater practical consequence to typical organised groups: one could hardly imagine such groups accepting members only formally bolstering their ranks with no activity being required of them other than merely declaring themselves as members. This issue, however, may be of greater significance, e.g. to terrorist structures. For it does not appear impossible for such organisations to recruit members whose activity would be expected only after some time, upon receipt of specific instructions.

In the case of passive participation in a group/association, however, one must remember that such a type of involvement in the activities of a criminal structure will in principle entail a lower level of social harm in the offender's conduct limited to accession to a criminalised structure with sustained intent to act for its benefit. While expressing support for regarding such conduct as criminal and punishable, one must also clearly emphasize that, due to its specific nature, it will be necessary for the prosecution to produce strong evidence of such passive membership, and any doubt in this regard should lead to such charges being dropped. The view that under Polish criminal statute passive membership in a criminal group or association is also prosecutable prevails in the literature;<sup>6</sup> one can, however,

<sup>5</sup> See K. Wiak, [in:] *Kodeks karny. Komentarz*, A. Grześkowiak, K. Wiak (eds), Warszawa 2019, p. 1294.

<sup>6</sup> See, e.g. A. Herzog, [in:] *Kodeks karny*, R.A. Stefański (ed.), 2018, *supra* n. 3, p. 1644; K. Wiak, [in:] *Kodeks karny*, A. Grześkowiak, K. Wiak (eds), *supra* n. 5, p. 1294; A. Michalska-Warias, [in:] *Kodeks karny. Komentarz. Część szczególna*, M. Królikowski, R. Zawłocki (eds), Vol. II, Warszawa 2016, p. 384; also concurring: M. Flemming, W. Kutzmann, *Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz*, Warszawa 1999, pp. 79–80; B. Gadecki, *Branie udziału w zorganizowanej grupie przestępczej*, *Prokuratura i Prawo* 3, 2008, p. 71; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 1998, p. 442; O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny. Komentarz*, Vol. III, Gdańsk 1999, p. 311; M. Kalitowski, [in:] *Kodeks karny. Komentarz*, Filar (ed.), Warszawa 2010, p. 1121; J. Skała, *Normatywne mechanizmy zwalczania przestępczości zorganizowanej w świetle przepisów kodeksu karnego (część 1)*, *Prokuratura i Prawo* 7–8, 2004, pp. 69, 65; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1997, p. 445; T. Wróbel, *Charakter zbiegu udziału w zorganizowanej grupie przestępczej oraz przestępstwo popełnianych w ramach działalności takiej grupy*, *e-Czasopismo Prawa Karnego i Nauk Penalnych* 20, 2013, [https://www.czpk.pl/dokumenty/publikacje/2013/12/20-2013-T\\_Wrobel-Charakter\\_zbiegu\\_udzialu\\_w\\_zorganizowanej\\_grupie\\_przestepczej\\_oraz\\_przestepstw\\_popelnianych\\_w\\_ramach\\_dzialalnosci\\_takiej\\_grupy.pdf](https://www.czpk.pl/dokumenty/publikacje/2013/12/20-2013-T_Wrobel-Charakter_zbiegu_udzialu_w_zorganizowanej_grupie_przestepczej_oraz_przestepstw_popelnianych_w_ramach_dzialalnosci_takiej_grupy.pdf) (accessed 25.3.2010).

also encounter a view opposed to the acceptance of such a broad spectrum of criminalisation.<sup>7</sup>

Full approval, on the other hand, should be granted to another view presented by the Court of Appeal in Gdańsk, according to which the participation in the structure described in Article 258 § 1 is a 'sustained offence and lasts as long as the membership in the group persists, without requiring the offender to perform any other criminal activities.' Indeed, the analysed offence as though by its very nature bears the characteristic of a sustained offence:<sup>8</sup> for the offender's conduct (affiliation to a criminal group) triggers a state of unlawfulness which the offender alone may interrupt (by withdrawing from the group) or which may be interrupted by others (e.g. total dismantling of the group by the law enforcement agency). Thus, the time of the commission of this offence is the entire duration of the offender's membership in the group or association, which could even be decades. This is also how this offence is perceived in the subject literature.<sup>9</sup>

The consequence is that to some extent the following view of the Court of Appeal in Gdańsk deserves to be accepted: 'There is no basis to eliminate a period of incarceration from the description of the act of participation in an organised criminal group (Article 258 § 1 CC), especially if, once released, the offender relapses into crime within the same organised criminal group, since such conduct clearly establishes the offender's sustained membership in the group.' First and foremost, the court's interpretation is consistent with criminological knowledge about organised crime. The rule for the members of such structures tends to be that their apprehension and penalisation alone does not terminate their membership in the group but only reduces it to a passive membership, as physical opportunities to act become limited. The above, however, requires proof; hence, as the Court of Appeal is correct to infer, whether incarceration has terminated membership in an organised criminal group is to be decided on the basis of all circumstances of the case. If, once released, the offender relapses into crime as part of the same criminal group, one can conclude that the circumstances show such offender to have continued to self-identify as a member of the relevant structure and been regarded as such by its other members throughout the period of his incarceration, otherwise the offender's easy resumption of criminal activity upon being released from incarceration would have been hardly probable (albeit not impossible). Such powerful circumstantial evidence,

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<sup>7</sup> Z. Cwiakalski, [in:] *Kodeks karny. Część szczególna*, Vol. II: *Komentarz do art. 212–277d*, W. Wróbel, A. Zoll (eds), Warszawa 2017, p. 535. The following authors also take a position in favour of requiring a certain level of activity: J. Wojciechowski, *supra* n. 6, p. 454; D. Gruszecka, [in:] *Kodeks karny. Część szczególna. Komentarz*, J. Giezek (ed.), Warszawa 2014, pp. 925–926.

<sup>8</sup> A sustained (or 'permanent') offence, as the literature explains, 'consists in the offender's triggering of a specific state of wrongfulness, which may be terminated in accordance with the offender's will or not' (see T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2006, p. 118).

<sup>9</sup> The following authors, among others, discuss the offence under Article 258 § 1 CC as a sustained one: A. Lach, [in:] *Kodeks karny*, V. Konarska-Wrzošek (ed.), 2018, *supra* n. 3, p. 1174; A. Michalska-Warias, [in:] *Kodeks karny*, M. Królikowski, R. Zawłocki (eds), *supra* n. 6, Vol. II, pp. 385–386; Z. Cwiakalski, [in:] *Kodeks karny*, W. Wróbel, A. Zoll (eds), *supra* n. 7, p. 547; K. Wiak, [in:] *Kodeks karny*, A. Grześkowiak, K. Wiak (eds), *supra* n. 5, p. 1294; A. Herzog, [in:] *Kodeks karny*, R.A. Stefański (ed.), 2018, *supra* n. 3, p. 1644.

however, requires corroboration with suitable evidence, but for which the period of incarceration should be eliminated from the established duration of participation in the relevant criminal group. The offender's continued participation in the organised criminal group can be attested by certain additional circumstances such as contacts with other members during the period (e.g. a finding that the offender has received parcels from members of that group; that they have helped him get legal assistance or in some way have taken care of his loved ones during the time; information relevant to the evaluation of the facts of the case may come, e.g. from intercepted conversation or correspondence, showing the offender to have continued to self-identify as a member of the group and expected immediately to resume activities after leaving incarceration or taken or given orders during incarceration).

One must remember, however, that continued membership of a group or association cannot be presumed, and thus, if any doubt emerges in this regard, the better solution may be to find that the offender's membership in the group has terminated during incarceration. Especially circumstances such as prolonged isolation in prison without communication with the other members, or the total dismantling of the group by the law enforcement agency, will support the finding that the membership has ceased (even irrespective of continued self-identification as a member). Any doubt in this regard must be resolved in the offender's favour, and any attribution of passive membership in the group requires strong evidence, so as to avoid imposing punishment for a mere intention. The finding that the nature of the offender's participation in the prohibited structure has been passive must also affect the evaluation of the degree of social harm in the offender's conduct; it cannot be excluded that this degree could, in certain facts of the case, even be found to be subminimal. For while in the case of an offender who accedes to the group and his continued participation is merely formal the criminality of this may be justified by the original activity consisting in the accession to the criminal structure, imposing punishment for the mere duration of membership while staying incarcerated appears to be anything but rational, constituting in essence a form of punishment for the offender's frame of mind. Things are different if the incarceration is preceded by a period of active membership; in those cases the offender's demonstrated solidarity with the other members of the group attests to a special intensity of malice and should be reflected in the overall evaluation of the offender's conduct.

It must be kept in mind that the offender could manifest the intention of terminating the membership, and if so, even his subsequent relapse into crime in that same structure will not mean that the membership continued throughout incarceration. For one cannot exclude a situation in which the offender sincerely withdraws from membership in the group or association but, upon leaving incarceration, finds himself unable to live any other life and renews his contacts. There are also sets of facts in which the offender's membership in the group will in principle cease upon being actually deprived of liberty. This will in particular be the case of an offender who decides to cooperate with the law enforcement agencies, whether as the so-called minor immunity witness (person who turns state's evidence) under Article 60 § 3 or Article 60 § 4 CC or 'proper' immunity witness (crown witness) pursuant to the Act of 25 June 1997 on turning state's evidence<sup>10</sup>.

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<sup>10</sup> Consolidated text, Dz.U. 2016, item 1197.

On the other hand, as numerous examples from the history of organised crime illustrate, an incarcerated defendant needs not even confine his membership to a passive form. Sometimes, the activities can continue in prison, for example, an imprisoned kingpin can continue to pass orders to members remaining at large. It is also possible to recruit new members and even build new elements of the criminal structure. For example, as the literature notes, during the first stage of the so-called great clan war in Sicily at the beginning of the 1980s, the Corleonesi were led from prison by Luciano Leggio, represented by his lieutenant, Toto Riina.<sup>11</sup> The Neapolitan Camorra, according to a legend, was born in prison and only from there 'poured out' onto Naples and the rest of the Campagna.<sup>12</sup> The fact that the prison environment is conducive not only to sustaining criminal ties but also to establishing new ones is attested by the phenomenon of prison gangs originating inside a correctional facility from where to eventually expand their operations to the outside, e.g. monopolising the trade in a particular type of narcotic drug.<sup>13</sup>

The sustained nature of the offence under Article 258 § 1 CC, as well as the fact that confinement in prison (or pretrial detention) need not terminate the offender's membership in an organised criminal structure make it extraordinarily important for the courts always to specify the exact timing of the commission of such crime so that the hypothetical continuation of membership in an organised criminal group after the period specified in the judgment also could be evaluated in the future from the perspective of criminal liability.

Considering all of the above reasons, the theses of the judgment at hand should in general, though with the aforementioned reservations, be received in a positive light as an example of the practice embracing a correct outlook on the essence of the criminal offence defined in Article 258 CC.

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<sup>11</sup> See M.-A. Matarid-Bonucci, *Historia mafii*, Warszawa 2001, pp. 195–197.

<sup>12</sup> See V. Paliotti, *Historia Kamorry*, Kraków 1998, pp. 18–24, 59–69; A.-M. Matarid-Bonucci, *supra* n. 11, pp. 234–249.

<sup>13</sup> To find out more about prison gangs, see e.g.: M.D. Lyman, G.W. Potter, *Organized Crime*, NJ 2000, p. 278. As those authors note, a prison gang should be defined as an, 'organization which operates within the prison system as a self-perpetuating, criminally-oriented enterprise, consisting of a select group of inmates who have established an organized chain of command and are governed by a code of conduct.' It is also emphasized that the typical prison gang, 'will usually operate in secrecy and conducts activities by controlling the prison environment through intimidation and violence toward non-members.'

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## GLOSS ON THE JUDGMENT OF THE COURT OF APPEAL IN GDAŃSK OF 9 AUGUST 2019, II AKA 60/19

### Summary

The commentary concerns the interpretation of the statutory features of the offence under Article 258 of the Criminal Code. The author shares the view of the Court of Appeal in Gdańsk that the period of imprisonment does not have to interrupt the offender's membership in an organised criminal group. The author also points out that the formal nature of the offence of participation in an organised criminal group does not mean that such participation may also be a passive one. However, a detailed interpretation of the very concept of 'participation' speaks in favour of accepting such a broad interpretation of this statutory feature of this offence. There is also no doubt about the sustained nature of the offence under Article 258 § 1 CC.

Keywords: organised criminal group, participation in an organised criminal group, formal offence

## GLOSA DO WYROKU SĄDU APELACYJNEGO W GDAŃSKU Z DNIA 9 SIERPNIĄ 2019 R., II AKA 60/19

### Streszczenie

Glosa dotyczy wykładni znamion przestępstwa z art. 258 k.k. Autorka podziela pogląd Sądu Apelacyjnego w Gdańsku, że pobyt w zakładzie karnym nie musi przerwać członkostwa sprawcy w zorganizowanej grupie przestępczej. Autorka zwraca też uwagę na to, że z formalnego charakteru przestępstwa brania udziału w zorganizowanej grupie przestępczej nie wynika, że udział taki może być też bierny. Za akceptacją tak szerokiej interpretacji znamion

tego przestępstwa przemawia jednak szczegółowa wykładnia pojęcia „brania udziału”. Nie budzi też wątpliwości trwały charakter występkę z art. 258 § 1 k.k.

Słowa kluczowe: zorganizowana grupa przestępcza, udział w zorganizowanej grupie przestępczej, przestępstwo formalne

## COMENTARIO DE SENTENCIA DE TRIBUNAL DE APELACIÓN EN GDAŃSK DE 9 DE AGOSTO DE 2019, II AKA 60/19

### Resumen

El comentario se refiere a la interpretación de los elementos de delito del art. 258 de código penal. La autora está de acuerdo con la postura de Tribunal de Apelación en Gdańsk que la estancia en centro penitenciario no interrumpe el hecho participar en el grupo criminal organizado. La autora subraya también que del carácter formal de delito de participación en un grupo criminal organizado no resulta que tal participación sea también pasiva. Sin embargo, la interpretación extensiva queda fundada en la interpretación detallada del verbo “participar”. Tampoco suscita dudas el carácter permanente de delito del art. 258 § 1 de código penal.

Palabras claves: grupo criminal organizado, participación en grupo criminal organizado, delito formal

## КОММЕНТАРИЙ К РЕШЕНИЮ АПЕЛЛЯЦИОННОГО СУДА Г. ГДАНЬСКА ОТ 9 АВГУСТА 2019 ГОДА, № II АКА 60/19

### Аннотация

Комментарий касается толкования признаков преступления, предусмотренного ст. 258 УК. Автор разделяет мнение Апелляционного суда г. Гданьска о том, что пребывание в исправительном учреждении не обязательно означает, что преступник перестает быть членом организованной преступной группировки. Автор также отмечает, что из формального характера преступления, состоящего в участии в организованной преступной группировке, не следует, что такое участие может иметь пассивный характер. Однако, в пользу принятия столь широкого толкования признаков этого преступления говорит подробное толкование понятия «участие». Нет также сомнений в том, что преступление, предусмотренное ст. 258 § 1 УК, имеет характер длящегося правонарушения.

Ключевые слова: организованная преступная группировка; участие в организованной преступной группировке; формальное преступление

## GLOSSE ZUM URTEIL DES BERUFUNGSGERICHTS GDAŃSK VOM 9. AUGUST 2019, AKTENZEICHEN: II AKA 60/19

### Zusammenfassung

Die Glosse behandelt die Interpretation der Tatbestandsmerkmale von Straftaten nach Artikel 258 des polnischen Strafgesetzbuches. Die Autorin teilt die Ansicht des Sađ Apelacyjny in Gdańsk, dass die Mitgliedschaft eines Täters in einer organisierten kriminellen Vereinigung



durch die Strafhaftverbüßung nicht nicht unbedingt unterbrochen wird. Die Verfasserin des Beitrags weist auch darauf hin, dass das formale Merkmal der Straftat der Teilnahme an einer organisierten kriminellen Vereinigung nicht impliziert, dass eine solche Beteiligung auch passiv sein kann. Die ausführliche Auslegung des Begriffes „Beteiligung“ spricht jedoch dafür, einer derart breit gefassten Auslegung der Merkmale dieser Straftat zu folgen. Keine Zweifel bestehen auch an der Dauerhaftigkeit des Delikts nach Artikel 258 § 1 des polnischen Strafgesetzbuches.

Schlüsselwörter: organisierte kriminelle Vereinigung, Beteiligung an einer organisierten kriminellen Vereinigung, formelle Straftat

#### GLOSE DE L'ARRÊT DE LA COUR D'APPEL DE GDAŃSK DU 9 AOÛT 2019, II AKA 60/19

##### Résumé

La glose concerne l'interprétation des caractéristiques d'un crime prévu à l'article 258 du Code pénal. L'auteur partage l'avis de la cour d'appel de Gdańsk selon lequel le séjour en prison ne doit pas obligatoirement mettre fin à l'appartenance de l'auteur à un groupe criminel organisé. L'auteur souligne également que la nature formelle du crime de participation à un groupe criminel organisé n'implique pas que cette participation puisse également être passive. Cependant, l'interprétation détaillée du concept de «participation» plaide en faveur de l'acceptation d'une interprétation aussi large des caractéristiques de ce crime. Le caractère permanent de l'infraction prévue à l'article 258 § 1 du code pénal est également hors de doute.

Mots-clés: groupe criminel organisé, participation à un groupe criminel organisé, crime formel

#### COMMENTO ALLA SENTENZA DELLA CORTE DI APPELLO DI DANZICA DEL 9 AGOSTO 2019, II AKA 60/19

##### Sintesi

Il commento riguarda l'interpretazione degli elementi costitutivi del reato dell'art. 258 del Codice penale. L'autrice condivide la posizione della Corte di Appello di Danzica che il periodo di detenzione possa non interrompere l'appartenenza del reo a un gruppo di criminalità organizzata. L'autrice fa anche notare che dal carattere formale del reato di partecipazione ad un gruppo di criminalità organizzata non deriva che tale partecipazione possa essere passiva. Depone tuttavia a favore di una tale ampia interpretazione degli elementi costitutivi di tale reato l'interpretazione particolare del concetto di "partecipazione". Non evoca altresì dubbi il carattere permanente del reato dell'art. 258 § 1 del Codice penale.

Parole chiave: gruppo di criminalità organizzata, partecipazione a un gruppo di criminalità organizzata, reato formale

**Cytuj jako:**

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