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**КОНСОЛИДАЦИЯ НА ИМУЩЕСТВЕНИ ПРАВА ИЛИ КОНКУРЕНЦИЯ ПРИ
ПОЗЕМЛЕНИТЕ РЕСУРСИ – ДОКОЛКО ОСП ГАРАНТИРА
ПУБЛИЧНИЯ ИНТЕРЕС
CONSOLIDATION OF PROPERTY RIGHTS OR COMPETITION IN
AGRICULTURAL LAND RESOURCES – DOES CAP GUARANTEE
PUBLIC INTEREST**

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Abstract

The current article analyses the effects of the CAP that have been transposed into Bulgarian national legislation in the form of a procedure consolidating the property rights, production factors and economic organizations in terms of agricultural land use. The problem originates from the fact that, due to the rules supporting consolidation and integration, a conflict arises with the goals of competition implemented in the CAP. Such an internal contradiction between goals makes the effect of property right regimes ambiguous, eventually leading to a high level of concentration and dominant position on a local scale. Ultimately, in the long-term perspective, this has led to deepening polarization and social inequalities between economic agents of different types and capacity, as well as between producers of various kinds of agricultural products.

Keywords: CAP, property rights, agricultural land, competition, fragmentation, concentration.

INTRODUCTION

This article studies how the Common Agricultural Policy (CAP) and the rules of the European Union (EU) and the member states (on the example of Bulgaria) generate negative coordination effects, which, in turn, allocate property rights in such a way that in the long-term perspective, integration of production resources obstructs competition. In the present case, the distribution of rights in the use of agricultural land is researched. This primary production factor is so significant for public interaction that the effects originating from it accumulate and this may lead to a situation different from the one originally set.

Bulgarian agricultural producers face the permanent necessity to increase their competitiveness by means of economies of scale. The CAP encourages their long-term integration both on a vertical and on a horizontal scale. Art. 39 and Art. 101 of the Treaty on the Functioning of the EU (TFEU)¹ and Regulation (EU) No 1308/2013² formulate a legal framework on the objectives of the CAP and competition within the EU, simultaneously determining the incentives for association of agricultural producers. On the other hand, the Agricultural Land Ownership and Use Act (ALOUA) Art. 37 creates additional opportunities for integration of organizations. This procedure develops hybrid regimes of both administrative and contractual mechanisms for consolidation of property rights of agricultural land use. This legal framework practically provides significant opportunities for economies of scale for certain economic agents. The fundamental issue is about the balance between the simultaneous competition and integration between economic entities on different levels. The current research suggests that not only agricultural producers benefit from this regime, and, moreover, not all of them are equally positioned.

In some European countries the distribution of rights in agricultural land has led to the resource being significantly consolidated, and focused in a small group of economic agents. Currently, the concentration of agricultural producers has been indisputably established in countries such as Latvia, Lithuania, Luxembourg, Spain, Sweden, France, the Netherlands, the Czech Republic, Estonia, Denmark, Germany, Hungary, Slovakia, etc. Concentration in agricultural lands has been identified also within the institutions of the European Union. The criteria for concentration have been formulated in a resolution of the European Parliament³.

Schwarzová and Bandlerová (2013) believe that this way of political positioning of economic rights is a reason for the existing differences in the development of the countries in the separate European regions. Kay (2016) determines that concentration in European agriculture is closely related to the way of consolidation of the agricultural resource. The author defines such a distribution as “grabbing” and suggests that the blame for such a behaviour should be attributed to the uncontrolled competition encouraged by the aspirations of the EU to achieve higher economies of scale.

The problem of property rights allocation and the resulting uncontrolled distribution of resources, leading to concentration and dominant position, also apply to the case of Bulgaria. The legislation introduces incentives for integration of agricultural producers on the basis of agricultural land use. On the other hand, despite the fact that Bulgarian legislation provides a legitimate definition of concentration (Art. 22, para. 1 of the Law on Protection of Competition – LPC), as well as one of a dominant position (Art. 20, para. 1 LPC), there is no place in this

¹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

² Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products.

³ See European Parliament Resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2016/2141(INI)).

legal frame for a quantitative measure of the described deformations. The legislation does not provide an answer to the question what amount of the resource agricultural land, owned or used by one or more persons, represents a form of a dominant position on a local level.

The problem concerns non-market advantages. This questions the degree to which the CAP accomplishes its goals in terms of competition. The rules and, in particular, secondary law and Bulgarian legislation create different opportunities for the different market agents. The procedures related to consolidation of agricultural land generate problems in the long-term adaptation of the small in terms of capacity agricultural producers. It is possible that this property rights regime, along with the high levels of concentration, may also lead to long-term polarization between the different economic agents, the different types of production of agricultural crops, a delay in the increase rate of the agricultural sector and various obstructions for the national economy.

PROPERTY RIGHTS REGIMES, COMPETITION AND ACCESS TO RESOURCES

The theory of property rights defines the latter as the ability of individuals and organizations to exercise their subjective power, turning it into economic benefits. Property rights reflect the expectations of their bearers that by controlling resources, they can gain economic goods, both through market exchange (Alchian, 1969) and through its parallel processes that create non-market opportunities (Tullock, 1967).

Property rights regimes are the very subsets of rules. Law, contracts, contractual and administrative mechanisms influence production or impose the distribution of objects, products, resources, information. They also set a predetermined framework of attitudes in the course of actions and economic relations. Individual behaviour "gravitates" around the listed objects of ownership in order to direct, change or terminate the economic outcome (Barzel, 2000).

The most significant issue is related to entering the domain of other persons' property right. This means violating the interest of the remaining part of society, which generates an externality. Coase (1960) considers that by means of using a contractual choice of property rights allocation, appropriate social optimum can be achieved. By "internalizing" of all factors – economic, environmental, etc., which integrate common effects, regimes that stimulate or sanction private bargaining aimed at the resource conservation in the longer term, should be created.

However, in a "cut" of the public matrix, it can be clearly seen that market allocation of rights does not necessarily and solely lead to positive effects. The problem is defined in terms of the obtaining of common benefit of a given private subjective right, interwoven with the long-term interest of the rest of society (Buchanan, 1985).

Access regimes trigger an institutional paradox. In accelerating the market redistribution of rights, forces are created that also support non-market ones. The opening of access (*res nullius*), aiming to make negotiating unrestricted and to

accelerate economic growth, can create opportunities for "grabbing" of resources. In the contemporary conditions, property rights regimes may, in striking contradiction with the original concept, alter the long-term trajectory of the use of resources. Thus, the aspiration towards consolidation of a highly fragmented resource can become an incentive for a change, in which, under the mask of creating integrated and respectively more competitive organizations, conditions of concentration and dominant position are generated.

The problem of property rights fragmentation in agricultural land, as an economic coordination issue, has been addressed in a number of countries, including Italy, Hungary, the Netherlands, Bulgaria, etc. (Van Dijk, 2003; Boliari, 2013). The consolidation of land resources as a deformation creating concentration in terms of economic organization, has been particularly pronounced in recent years in numerous countries around the world (Roberts and Key, 2008; Kay, 2016), etc.). In particular, the concentration of agricultural production on the basis of consolidated areas of agricultural land is characteristic of the current stage of development of agriculture in the EU, and a consequence of the operation of the CAP.

Competition in the field of resources can determine both market power and political one (Sikor and Lund, 2009). This is indeed a fundamental issue of the public choice theory – the simultaneous action of integration and competition as a condition for balance between the public and private interests of economic agents in terms of resources (Kessler et al., 2002).

RESTITUTION IN BULGARIA AND FRAGMENTATION OF RIGHTS AND RESOURCES

In the 1950s, agricultural lands became a part of large, centralized farms typical for the process of "collectivisation". Agricultural land in those years outside the mentioned farms was small in size and served mainly to meet personal needs. This meant two things: (1) that only one type of organizational structure possessed almost the entire resource; (2) since these structures did not trade with land, and since deals were virtually almost non-existent in practice, it is pointless to discuss the market relations and problems of competition during that period. The 1991 Constitution made it possible to restore "private property" in the country.

With the constitutional reform of 1991 and the amendments of the Bulgarian legislation, the restitution of agricultural land began in "real boundaries", and by 1999 over 2,000,000 properties had been returned. The returned more than one property, albeit in the same land area, turned out to be in different locations. This made agricultural land fragmented. On the other hand, due to the long term (over 40 years) since the moment of collectivization to the beginning of restitution, agricultural land in many cases proved to be inherited. The classical doctrine of Roman law, adopted by the Bulgarian legislation in terms of inheritance, further fragmented the property rights of these numerous small plots (see *Inheritance Act*). Such fragmentation of the ideal parts of property, actually represents fragmentation of property rights themselves.

The fragmentation was accompanied by a number of property disputes which, together with the administrative trials and court appeals, resulted in over BGN 5 billion in public spending (more than EUR 3 billion, if the currency value of that period is taken into account). In practice, the numerous lands remote from one another, together with the large number of property rights exercised by a large number of entities, led to high transaction costs. The allocation of property rights is the cause of high transaction costs which are an additional burden for the producers of that period. The difficulties in concluding deals between co-owners proved to be a serious barrier to market relations. They generated conditions for both a sustained decline in agricultural land prices, and additional problems related to the access to capital. It can be assumed that, at the time, a large share of the farmers possessing property, could not manage this property. This resulted in (1) abandoned agricultural land; (2) low potential of small farms. Similar processes are observed in many countries around the world (Kwabena et al., 2017), the specifics in Bulgaria being that fragmentation is deepened and accelerated to a great extent by the means of property rights inheritance in the country, which has not changed significantly since the totalitarian period (Swinnen and Vranken, 2010).

Simultaneously with the process of restitution, the process of liquidation of the old production structures was taking place. The latter is important because the property of buildings, machinery, and the land beneath them was restored under a different order, through a system of auctions. In these processes, the owners who had not received compensation, participated in the purchase of such properties through a voucher system. Thus, relations, in spite of their market character, did not facilitate the development and positive extension of economic organizations. Many of the farms stopped functioning, and production units, as well as their composite buildings, machinery, livestock and production, were removed from the market turnover. Logically, along with the lack of interest⁴ in many landowners, there was an increase in the "denial" of property rights over agricultural land and the emergence of many new and permanently uncultivated lands.

Additionally, the buildings with adjacent land became property or were provided to owners under §4 of the ALOUA, while the arable land near them was returned to other persons, which made it difficult to create large and efficient economic structures. Ultimately, the processes of restitution and property liquidation led to: an increase in the amount of non-arable land in the country; a decline in the number of producers and their average incomes; a reduction of agricultural production in the entire sector. The public need for rules facilitating the consolidation of agricultural land and property rights associated with it, has grown.

FROM FRAGMENTATION TO CONSOLIDATION OF AGRICULTURAL LAND

The fragmentation explained above had some local exceptions. In the northern parts of the country – Dobrudzha district, a rapid consolidation of agricultural lands began, based on their usage. The land in this part of the country

⁴ The lack of interest is mainly referred to, in co-owners of agricultural land living in the city, who are not interested in agriculture, and whose attitude can be defined as "broken" ties with the land.

was quickly consolidated on the basis of the interest in the production of high-intensity agricultural crops (grain), traditional for the region. In other cases, the interest of companies from the food industry⁵ led to the acquisition of agricultural land with the purpose of optimizing production.

The state played a major role in the creation of incentives leading to the development of a market environment by increasing the number of subjects and consolidation, but also in turning legal opportunities into economic advantages. At the beginning of the restitution in 1992-1993, agricultural land could only be rented, only under the Obligations and Contracts Act (OCA). The OCA, however, was developed in 1952 for the needs of a centralized real estate market. Along with other legal sources for rental rates – the Rent Act of 1947 (rev. in 1969 by the Rental Legal Relations Act, rev.), the cited act could not reflect the dynamics of the new market relations of agricultural land. No account was taken of the technological, economic and other effects in agricultural production. In the provision for example of Art. 229 of the OCA a maximum duration was established for the lease agreements – not more than 10 years for some of the participants. This period was extremely inappropriate, if the contract concerned the rent of an agricultural plot for the production of perennials. It turned out that the payback period of the investment would have a little shorter duration than the termination period due to expiration of the contract. There was a lack of "flexibility" of the possibilities also in terms of the price, the payment methods, the termination and payment terms, etc. Producers were obliged to pay the complete remuneration irrespective of the benefits associated with land use. Thus, in cases of non-compliance, including due to disasters, natural and other crises, the risks of contracts with an object agricultural land were faced solely by the producers. The development of new law was aimed at protecting the production relations in regard to agricultural land, and providing benefits to those who produce "goods" on farmland. Such law was the adopted Farming Lease Act (FLA, 1996).

During this period, it can be supposed that the need for consolidation becomes an obstacle for the establishing of a legislative solution to some problems related to the open access in agricultural land. Despite the availability of procedural rules, in practice the problem of the illegal appropriation of agricultural land persists⁶.

In 2006, following an amendment of the ALOUA and the Special Purpose Investment Companies Act (SPICA), financial-investment companies with an object of activity: acquisition and management of agricultural land, also known as the "land funds", began to operate on the agricultural land market. They should be distinguished from those created by law – the State Land Fund (SLF), and the Municipal Land Fund (MLF). These funds are not corporations, and the entire state and municipal land property is collected in them. They also include the so called "unreclaimed lands" from the process of restitution. The above-mentioned

⁵ Such companies are just an exception, belonging only to the wine production sector.

⁶ Constantin et al. (2017) elaborate on the relation between "land grabbing", economies of scale and food safety. Problematic property right regimes in agricultural land have been defined by the authors as an important prerequisite for "land grabbing".

companies, being typical traders within the meaning of the Commerce Act (CA), performing speculative transactions, similarly to the financial institutions, were given the right to manage agricultural land as land owners or lessors. An important advantage was their exemption from some taxes, such as the dividend tax when land acquisition deals were conducted through the stock exchange. The main advantage, however, was another one.

"The right of first refusal" (Danyliuk, 1997) was incorporated in the Bulgarian law doctrine as well. As regards the large agricultural producers who have gained power, the legislator "did not have difficulties" to offer them additional incentives for consolidation. The provision of Art. 4a of the ALOUA provided for an obligation for the owners of agricultural land to offer first to those of the users who have concluded a long-term contract – for land lease or under the OCA for a term of more than 5 years. This provision, which operated from 2010 to 2012, has been abolished because of its contradiction with both constitutional rights and freedoms, and with a general legal principle⁷. Despite the revocation of this legal provision, for the short two-year term certain companies managed to consolidate a substantial agricultural resource due to this advantage.

Over the last two years, due to the increase in both land prices and the rent allowance in certain regions, there has been a further activation of farmers aimed at an additional consolidation of plots. In this respect, in July 2017, some "minor obstacles" for large farmers to impose their "market power" were removed. This, however, was performed by the judiciary system authorities. By Decision № 2/2015 of 20.07.2017 of the GACTC at the SCC⁸, by the interpretative method, the possibility was created for the land lease to be a subject to conversion⁹ into rent. This would determine: (1) An opportunity to "circumvent co-ownership" when there are many co-owners. A contract is concluded with all co-owners in lease relations, while in rents a contract can be concluded with only one of them (this automatically makes the rent cheaper and preferred); (2) Fewer restrictions in terms of the form of the conducted transactions and a lack of invalid transactions in cases of its breach, which is in favour of those who enter into short-term transactions – the interests of large owners and land users are protected; (3) Continuation of the relations when the transaction is commercial (Art. 229 of the OCA), continuation of the legal relation, including for a period longer than 10 years, and such are only transactions between traders, large producers and owners of agricultural land; (4) The same legal effect obtained with lower transaction costs for the large producers and companies which conduct trade and manage agricultural land. This means that the interpretation "benefits" only large companies and facilitates further their consolidation.

⁷ The principle of equality in the context of the freedom of contract making.

⁸ The Supreme Court of Cassation (General Assembly of the Civil and Trade Colleges), which, according to Bulgarian legislation, have the right to interpret law by unifying the practice of the judicial acts of the judiciary bodies. They are obligatory for the judiciary system, and even though they are not a legal source, they serve as a basis for resolving legal disputes.

⁹ Conversion (jur.) is envisaged here. It represents the transition of one type of transaction into another, in this case – land lease into rent, and subsidiary application of the provisions of the OCA in the contracts thus obtained.

According to data from own sources, legislation has contributed to the following relative values of consolidation (Table 1):

Table 1. Annual relative share of large land owners and users and land cultivated by them

Year	2007	2010	2013	2017
Large land owners and users from total	3,2%	3,0%	2,4%	1,6%
Land cultivated by large land owners and users	11,0%	50,0%	83,0%	85,0%

Source: Own research

The observed trend shows that over the previous decade, not only the size of cultivated agricultural land in the country, but also its share managed by large land owners and users, have increased. At the same time, the relative share of large actors has declined. Therefore, large investment companies and large producers integrate despite the fact that the total number of farmers is reduced.

RULES ON INTEGRATION, SUSTAINABLE RENT, PROBLEMS FOR COMPETITION

The rules on the consolidation of agricultural land were developed in response to the high fragmentation of both property rights and agricultural land resulting from restitution (1992-2000). The main purpose of the amendment of the legislation (after 2007) was to establish such property rights regimes, which would increase the production of agricultural land.

The procedure under Art. 37 of the ALOUA, Art. 69-72 of the Code for Application of the ALOUA and the Regulations for the registration of agricultural producers and the payments to them, have formed a legislative basis determining the possibilities to stimulate the production in the case of the consolidated use of the resource. The procedure was in line with Regulation 1308/2013. The regime aimed at creating competitive farmers on the basis of contractual integration in relation to the common organization of the market under Art. 40, para. 1 of the TFEU. This procedure created secondary access to agricultural land at a local level, where each owner and user should have been able to participate in the distribution of farmland; to become active when it comes to land that is not being cultivated; and to benefit from possible economies of scale in relation to the objectives of the CAP (Art. 39 TFEU). In this sense, the rules are "based" on a well-known concept of the benefits of resource sharing and collective action (Dasgupta, 2009).

A brief description of the procedure under Art. 37 of the ALOUA.

Conditionally, the procedure may be described as a set of different types and sometimes alternative administrative procedures such as: declaring property

or use circumstances or their corrections; registration or rejection; in cases of a "dispute", proceedings of new "post-dispute" declarations; upon notification by the Regional Agricultural Agency and the Regional Office of the Department of Agriculture, the Municipality; in cases of providing properties being a part of the District Land Fund and the State Land Fund; in cases when "projects" for rural roads or irrigation channels are distributed within the boundaries of agricultural lands. The number of these "sub-procedures" is high, which complements the already established additional advantages obtained on the basis of a higher capacity of the larger participants.

(1) *Participants*. Thirteen institutional actors are additionally involved in the procedure, aiming to assist, through mediation, control, disclosure of information, etc., producers and owners of agricultural properties. Probably, they have adopted a part of the property rights in their favour. Two questions arise: (1) Which economic agents are actually assisted by these thirteen institutional actors; (2) If market rights are adopted by the actors listed above, can we talk about a competitive regime. A specific group of participants are "inactive". Due to non-compliance with a limitation period, agricultural land owners who do not submit an application under Art. 69 of the Code for Application of the ALOUA, are denied the right to cultivate their lands within the next business year.

Does such an abolishment of a right of management for a period of one year contradict the principle of free bargaining, which is reflected in Art. 19 of the Constitution of the Republic of Bulgaria? And if it does not contradict it, which subjects are economically affected by such a rule. In practice, the rule may impose or alter the motivation of the heterogeneous group of entities with "denied right for one year" to manage their own property. Depriving them of the access to this right actually takes away from them the opportunity to gain a higher rent than the average for the land area. Their ability to "choose", thus better maximize their benefits, is reduced. When owners cannot choose how to use agricultural land or gain benefits from it, they cease to regard it as an economic asset. In fact, they deny their property rights (Sikor et al., 2017). This property right regime practically influences adversely the competition between agricultural producers.

(2) *Agreements between users* – the agreement on the distribution of use under Art. 37 of the ALOUA between users is indeed an agreement between the large producers on the land area. They are the ones between whom an administrative distribution of land will be performed in case they do not manage to reach a consensus. Large users possess advantages because of the possibility that additional land obtained from the distribution can be attached to some of the already formed large land plots owned by them. The opportunity for an unimpeded entry of new market actors into such local markets, is hampered. Where the resource is not exhausted, new agricultural producers will be able to use for agricultural purposes only land located far from the populated area, with a lower economic rating. Thus, the agreement will affect the size of the rent received, by deforming the average rent, on the basis of which the payments under Art. 37c, para. 7 of the ALOUA are determined.

(3) *Payments on the use of agricultural land originating from the procedure under Art. 37.* These cash effects, which are obtained as a kind of rent, are an effect following the procedure of using additional agricultural land under Art. 37 of the ALOUA. I.e. they represent an additional rent payment different from the one established in the contract. Such a payment, according to the law, is compensatory. This means that the persons who have to receive it, are defined as guilty of inaction, in case that they do not receive it. Its monetary dimension is equal to the average rent for the land plot. In reality, however, they have not always been given the opportunity to know about their agricultural properties subject to allocation. This deprives them of the opportunity to negotiate a higher rent than the average for the land plot. In other cases, these landowners learn about their private claims only when they are "time-barred". These payments are usually not refundable after the passing of five years (unfortunately, an incorrect practice is observed of reducing this period to only three years, since it is inaccurately assumed that this is a periodic payment in accordance with Art. 111 of the OCA).

The procedure under Art. 37 of the ALOUA provides for conditions for: small agricultural landowners not to be interested in prolonged participation in the procedures for the consolidation of use. The cases of "unreceived rent" lead to permanent demotivation for actions related to the management of these agricultural lands. Logically, the owners of such properties eventually "refuse" ownership, which transfers into the property of some of the large land companies. The procedure under Art. 37 of the ALOUA creates conditions for small owners of agricultural land to be permanently uncompetitive.

(4) *Registry system* known as: "Farm – use of agricultural land", containing a graphic map of the agricultural lands, identification according to the Cadastre, the manner of their management, their boundaries, including information about the lands with declared or non-declared boundaries, participants in the procedures and the agreement, as well as the rent and lease agreements. Large companies wishing to acquire additional land in such an allocation, are required to declare their contracts once for the period of their operation. This is not the case with "small landowners", who will have to submit a declaration under Art. 69 of the Code for Application of the ALOUA every year.

The information system acts locally. This flow of information practically creates two types of organizations. The first one is of a hybrid nature. The problem lies in the fact that such hybrid organizations are established and maintained solely between large owners and users of agricultural land, and administrative bodies. The second type of organizations follow the asymmetric flow of information. They involve small agricultural landowners (single separate properties) and especially owners whose address is different from the location of the land area where these properties are positioned. The asymmetric flow of information certainly hampers the integration of the representatives of the second group, which lowers their level of adaptation in comparison to the ones belonging to the first group (Furtan et al., 2007).

The information asymmetry in agricultural land has led to processes whereby some stakeholders convert their knowledge of the local environmental structure into an asset, and thus aggregate resources within a concrete agricultural area. These opportunities along with economies of scale, at this level, provide a combination of rent payments and subsidies that not only can cover the large owners' and producers' costs at a very low production efficiency, but can also fully establish a lack of production goals for them. The interest of economic agents becomes more and more dependent on the subsidies per unit of land area. This leads to an increase of efforts to establish sustainable rents or efforts directed towards the capitalization of a part of the benefits into political ones (Czyzewski and Matuszczak, 2017). The theoretical goals and those of law are accomplished. However, the system of agricultural land property rights regimes is not in line with the objectives of CAP policies, since it fails to develop a competitive environment.

CONCLUSIONS

1. The CAP creates a legal framework which prevents cartel agreements related to production. However, in terms of resources (agricultural land), the incentives for consolidation lead to concentration and dominant position.

2. The lack of restrictions in the process of association between agricultural producers leads to the formation of hybrid mega-companies which limit the access of small producers to resources. This eventually reduces competition. Monoculture agriculture in Bulgaria is already a fact.

3. These processes develop further due to the amendment in Art. 4a (2) of the ALOUA of June 2018, according to which co-owners possessing only 25% of the land property have the right to manage rent deals without the explicit consent of the remaining co-owners. This institutional change will further polarize organizational structures and types of farmers. The large-scale land owners and producers will be interested in developing market relations only within their own category, excluding small economic agents.

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