

# Bribery & Corruption

Second Edition

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# Romania

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## **Brief overview of the law and enforcement regime**

During the years 1994-1999 the Romanian Government reported that 2,681 individuals were convicted for various acts of corruption. Of this number, the largest amount of convictions were obtained for accepting a bribe – 1,359; just over 50%. In 2000 Romania amended its corruption laws by expanding the scope of the pre-existing laws, and increasing some penalties. Yet another approach is to interest the media in the situation. This type of pressure is broader-based than the filing of a complaint. Romanian newspapers are not shy about reporting the wrongs of government employees. Such articles appear on a continual basis and serve as a pressure point for a cleaner, better government.

For decades, Romanian authorities have been fighting against endemic corruption, with increasing success. The latest and certainly the most resounding scandal of this year is the “EADS-Microsoft-Siveco Case”, in which financial mismanagement occurred as a result of the acquisition of products and services at prices above market value, up to 50% higher. There are two aspects that make this case a high-level corruption one. One is the amount of the bribe – €20m – and the extent of this case which involves nine ministers from various political parties connected with Education, Finance and Communication, creating a network at the highest level of Government.

As such licences were provided by the American company Microsoft, the second aspect of great importance is that the case seems to have much larger, cross-border implications. It appears the investigation was conducted by the Federal Bureau of Investigation (FBI) and wasn't started in Romania but in the USA, or so the former director of Romania's Foreign Intelligence Service (SIE) has declared.

More specifically, the case centres on three particular contracts agreed between 2001 and 2013 by nine former ministers to acquire IT licences as well as software and hardware equipment for schools in Romania at unreasonably high prices: the Contract for the lease of Enterprise Agreement Subscription licences from Microsoft, between the Romanian Government and Microsoft through Fujitsu Siemens Computers (FSC) Austria GmbH; the Contract for the lease of Enterprise Agreement Subscription licences from Microsoft, concluded between the Ministry of Communications and Information Society and the D-CON.NET consortium; and the Contract concerning the Computerised Education System (MEC SEI), concluded between Siveco and the Ministry of Education against which the National Anti-corruption Directorate (DNA) has begun the prosecution *in rem*, for influence peddling, abuse in office, and taking and offering bribes.

The main legislative acts that govern corruption offences in our country are: the Romanian Criminal Code, Law no. 78/2000 on the prevention, discovery and punishing of corruption

acts; Law no. 656/2002 on the prevention and sanctioning of money laundering; and Law no. 82/1991 on accounting registrations.

According to article 289 of the New Romanian Criminal Code (NCC), bribery is the act of a public employee who, directly or indirectly, for himself or for another, claims or receives money or other benefits not due to him, or accepts the promise of such benefits in connection with the performance, breach, acceleration or delay in the fulfilment of an act falling within the duties of his office or in relation to the performance of an act contrary to these duties.

This offence is punished with imprisonment from three to ten years and deprivation of the right to hold public office or to practise the profession or activity in the execution of which the crime was committed.

The act described in the paragraph above committed by a public servant (as described in article 175, paragraph 1 of the NCC) is considered an offence only when committed in connection with the failure, delay of the fulfilment of their duties regarding a legal act, or in connection with performing an act contrary to these duties.

The money, values or other goods received as a result of bribery are subject to confiscation, and when they no longer exist, the equivalent shall be confiscated.

In the new legislative perception, the offence of bribery stipulated in article 289 of the NCC is reformulated in comparison to the Old Romanian Criminal Code (OCC) and contains a few essential changes of content, among which we can find the inclusion of the conduit sanctioned as the offence of *receiving undue benefits* (OCC).

One of the first changes of this legal provision in comparison to the OCC is the quality of the author of the crime (the active subject of the crime). In the NCC the author can only be a public servant, in contrast to the OCC which did not condition the existence of the offence on account of the quality of the author. Moreover, in the 2<sup>nd</sup> paragraph of article 289 NCC, bribery is stipulated as a attenuated version of the crime, if the author is a person associated with a public servant (as described in article 175 paragraph 2) and, according to article 308 of the NCC, the punishment being lowered by a third of the period of imprisonment provided for the crime stipulated in article 289 paragraph 1.

Law no. 78/2000 institutes measures for preventing, discovering and sanctioning of corruption acts and applies to the following persons:

- a) who exercise a public position, irrespective of the way in which they were invested, within public authorities or public institutions;
- b) who fulfil, permanently or temporarily, according to law, a position or a task, to the extent to which they participate in decision-making, or they can influence it, within public services, autonomous administrations, trading companies, national companies, national societies, cooperative units or other economic units;
- c) who carry out control duties according to the law;
- d) who grant specialised assistance to the units stipulated in letters a) and b), to the extent to which they participate in the taking of decisions or can influence them;
- e) who, irrespective of their capacity, achieve, control or grant specialised assistance, to the extent to which they participate in decision-making or can influence it, with regard to operations that involve capital circulation, banking, hard currency exchange or credit operations, investment operations in stock exchanges, in insurance, in mutual investment or regarding the bank accounts or those assimilated to them, domestic and international transactions;
- f) who have a management position in a political party or formation, in a trade union, in an employer's organisation or in a non-profit society or foundation; or

g) other natural persons than those stipulated in letters a)-f), under the terms stipulated by law.

The same law stipulates special rules of conduct for certain categories of persons, for the purpose of preventing corruption acts in article 2: the persons stipulated in article 1 are compelled to carry on the duties that are incumbent on them in exercising their functions, duties or tasks assigned to them, by strictly observing the laws and rules of professional conduct, and to ensure the protection and the carrying-out of the legitimate rights and interests of citizens, without using their positions, duties or tasks received, for obtaining them or for other persons of money, goods or other undue advantages.

The persons stipulated in article 1 letter a) – as well as those that hold a management position, from directors included, and up, within the autonomous administrations, national companies, national societies, trading companies in which the state or an authority of the local public administration is a shareholder, the public institutions involved in the carrying out of the privatisation process, the National Bank of Romania, or the banks in which the state is the controlling stockholder – have the obligation to declare their assets under the terms of Law no. 115/1996 on declaration and control of the assets of dignitaries, magistrates, civil servants and of certain persons with management positions. The non-submission of the declaration of assets by the persons stipulated in paragraph 1 brings about the *ex officio* opening of the control procedure of the assets under the terms of Law no. 115/1996.

Law no. 78/2000 also provides that the persons stipulated in article 1 letters a) and c) are obliged to declare, within 30 days from receipt, any direct or indirect donation or physical presents received in connection with the exercising of their functions or duties, with the exception of those that have a symbolic value. The provisions of Law no. 115/1996 referring to the modality of submission of the declaration of assets applies accordingly also in the case stipulated in paragraph 1.

The offences of bribe taking – stipulated in article 289 of the NCC; of bribing – stipulated in article 290 of the NCC; of receiving undue advantages stipulated in article 289 in the NCC (in the OCC this offence was distinctly stipulated in article 256); and of intercession – stipulated in article 291 in the NCC, are punished according to those texts of law.

The act of bribe taking, stipulated in article 289 in the NCC, if committed by a person who, according to law, has duties of finding or sanctioning the contraventions, or finding pursuit or judging the infractions, are sanctioned with the punishment stipulated in article 254 paragraph 2 in the NCC regarding the committing of the infraction by an official with control duties. The deed of bribing carried out towards one of the persons stipulated in paragraph 1 or towards an official with control duties is sanctioned with the punishment stipulated in article 255 in the NCC, the maximum of which is increased by two years.

The infractions of accepting undue advantages and intercession, if committed by one of the persons mentioned in paragraph 1 and 2, shall be sanctioned with the punishment stipulated in article 256 in the NCC, respectively in article 257 in the NCC, the maximum of which shall be increased by two years.

The provisions of articles 254-257 in the NCC also apply to the managers, directors, administrators and auditors of trading companies, national companies and societies, autonomous administrations and to any other economic units.

The attempt to commit the offences stipulated in the present section is punishable, according to the Romanian criminal provisions applicable.

## Overview of enforcement activity and policy during the past two years

In Romania, both petty and political corruption remains a significant problem. Although some positive results have been observed when it comes to prosecution of high-level corruption cases, the political will to address corruption and promote high standards of integrity has been inconsistent.

Romania's former ***Transport Minister*** was questioned on August 13<sup>th</sup> 2014 by prosecutors of the National Anticorruption Directorate regarding complicity to abuse of office in a case involving three contracts concluded between his law firm and state energy companies, reports local Mediafax. The prosecutors are currently investigating how these contracts were assigned.

The Bucharest Court of Appeal gave a 10-year prison sentence in the case of a well-known ***Romanian mogul***, one of the country's most powerful people, in a corruption case related to the privatisation of a food research institute. The historic verdict is final and comes after years of judicial procedures, delays, political manoeuvring and media attacks on the judiciary. A previous court had given a five year sentence in the same case, but it was appealed. The seizure of several properties as well as 5.8m RON from the defendant's daughters – who are running his businesses officially now – was also decided as part of the verdict today. Several other people also involved in this corruption case received sentences of up to eight years.

This businessman and politician who rose to prominence on the back of his connections with the former communist regime's dreaded secret police and intelligence services, has been accused in the case of the privatisation of the Institute of Food Research, in which a plot of land in Bucharest was bought for a minuscule price. He has founded the Conservative Party, which is part of the current governing coalition with the Social Democrats (PSD) and has used his media empire – the Intact media group, which includes TV and radio stations – to attack arch-rival President Traian Basescu, other political rivals, as well as the judiciary. The indicted person has been a political and power broker for almost two decades, using his media outlets to help push his rather small political party in parliament repeatedly in successive general elections and to have it seated in government coalitions several times. He spearheaded the suspension of the current President by the Parliament in 2007 and a repeated attempt to do so in 2012, which led to a major political crisis. His attempts to dodge prison sentences in this case over the past several years included decisions to resign as a Senator and run again for a parliamentary seat, which meant the case was moved from one court to another and the verdict was thus delayed for a long time.

A wave of corruption cases launched by anti-graft prosecutors in Romanian courts culminated in the 2012 sentencing of ***former prime minister*** Adrian Nastase.

Nastase recently ended his second jail term for corruption after serving only six months behind bars. It was the second jail sentence he had received in recent years. In June 2012, he was given a definitive two-year jail sentence for corruption. The former premier dramatically tried to shoot himself in the neck when police took him into custody. Last March, he ended his jail term after just eight months behind bars, after being released for good conduct.

The convicted Prime Minister of Romania had a mandate from December 2000 to December 2004 and stood for the Social Democratic Party, PSD, in the 2004 presidential election. He has faced other corruption allegations. In April 2012 he was given a three-year suspended jail sentence for blackmail but was cleared of corruption in a case that dragged on for

over six years. In December 2011 he was cleared in another corruption case, concerning a €300,000 inheritance from his wife's aunt.

### **Law and policy relating to issues such as facilitation payments and hospitality**

According to Romanian criminal legislation, no distinction is made between bribes and 'facilitation' payments, which are also prohibited. A facilitation payment is a small payment to a low-level public official, which is not officially required, to enable or speed up a process which it is the official's job to arrange.

A bribe includes a benefit given or received in any form, which may include: cash, favours, unfair advantages for family or friends in respect of training or employment opportunities (secondments, work experience, trainee positions, internships or permanent positions), the provision of services, gifts, hospitality or entertainment.

The giving and receiving of modest gifts and hospitality is acceptable business practice providing that it is proportionate and not done solely in order to gain or retain business or to create a business advantage.

### **Key issues relating to investigation, decision-making and enforcement procedures**

The offences provided by Law no.78/2000 with its subsequent amendments and completions, committed in one of the circumstances described below, fall under the jurisdiction of the National Anticorruption Directorate:

- a) if, regardless of the capacity of the persons who committed them, they caused a material damage higher than the equivalent in RON of €200,000, or if the value of the sum of the goods which represent the object of the corruption offence is higher than the equivalent in RON of €10,000;
- b) if, regardless of the value of the material damage or the value of the sum or of the goods which represent the object of the corruption offence, they are committed by deputies; senators; Romanian members of the European Parliament; the member appointed by Romania within the European Commission; Government's members; state secretaries; under-state secretaries and persons linked to them; counsellors of the ministers; judges of the High Court of Cassation and Justice and of the Constitutional Court; other judges and prosecutors; members of the Superior Council of Magistracy; the president of the Legislative Council and the person who replaces him/her; the Ombudsman and his/her deputies; presidential and state counsellors within the Presidential Administration; state counsellors of the Prime Minister; external public members and auditors from the Court of Accounts of Romania and of the County Chambers of Accounts; the Governor and the First Deputy Governor and the Deputy Governor of the National Bank of Romania; the president and the vice-president of the Council of Competition; officers, admirals, generals and marshals; police officers; the presidents and the vice-presidents of county councils; the general mayor and the deputy mayors of the Bucharest municipality; the mayors and the deputy mayors of the sectors of Bucharest; the mayors and the deputy mayors of municipalities; county counsellors; prefects and sub-prefects; leaders of the central and local public institutions and authorities and the persons filling control positions therein, except for the leaders of public institutions and authorities at the level of towns and communes and of persons with control positions within them; lawyers; commissioners of the Financial Guard; customs employees; persons with leading positions, higher than and including that of a director within the autonomous administrators of national interest, of national companies and firms, of banks and

trading companies where the state is a main shareholder, of public institutions having tasks in the privatisation process, and of central financial banking units; and persons provided by articles 293 and 294 of the NCC.

According to Government Ordinance no. 43/2000, the National Anticorruption Directorate is set up as a structure with legal personality, within the Prosecutor's Office attached to the High Court of Cassation and Justice, following the reorganisation of the National Anticorruption Prosecutor's Office.

The National Anticorruption Directorate has its headquarters in Bucharest and exercises its duties on the entire Romanian territory with specialised prosecutors in combating corruption.

The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice leads the National Anticorruption Directorate through the chief prosecutor of this Directorate. The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice solves conflicts of jurisdiction which arise between the National Anticorruption Directorate and the other structures or units within the Public Ministry.

The National Anticorruption Directorate is independent in its relations with the courts and with the prosecutor's offices attached to them, as well as in its relations with other public authorities, exercising its duties under the law and only for its enforcement.

In accordance with Government Ordinance no. 43/2000, the duties of the National Anticorruption Directorate are the following:

- to conduct criminal investigations under the conditions provided by the Criminal Procedural Code, by Law no. 78/2000 on preventing, discovering and sanctioning corruption offences and by the present emergency ordinance, for offences provided by the Law no. 78/2000 which fall, according to article 13, under the jurisdiction of the National Anticorruption Directorate;
- to conduct, supervise and control criminal investigation acts, carried out as a result of the prosecutor's orders by the judicial police officers who are under the exclusive authority of the Chief Prosecutor of the National Anticorruption Directorate;
- to conduct, supervise and control the technical activities of the criminal investigation, carried out by specialists in the economic, financial, banking, customs, IT fields, as well as in other fields, appointed within the National Anticorruption Directorate;
- to notify the courts for taking the measures provided by law and for prosecuting cases regarding the crimes provided by Law no. 78/2000, with its subsequent amendments, which fall, according to article 13, under the jurisdiction of the National Anticorruption Directorate;
- to take part in trials, under the conditions provided by law;
- to exercise the means of appeal against judges' decisions, under the conditions provided by law;
- to study the causes which generate corruption and the conditions which favour it, to draw up and submit proposals with a view to their elimination, as well as to improve criminal legislation;
- to draw up an annual report on the activity of the National Anticorruption Directorate and to present it to the Superior Council of Magistracy and to the Minister of Justice not later than February the next year, and the Minister of Justice will present to Parliament the conclusions on the activity report of the National Anticorruption Directorate;
- to set up and update the database in the field of corrupt deeds; and
- to carry out other tasks provided by law.

The National Anticorruption Directorate exercises its rights and fulfils its procedural tasks provided by law in matters regarding the offences provided by Government Ordinance no. 43/2000 under its jurisdiction. In performing his/her duties, the Chief Prosecutor of the National Anticorruption Directorate issues orders.

Under Romanian law another option is to report corrupt acts to the Prosecutor General's Office. Prosecutors (magistrates) are the lead investigators in corruption cases. This approach is based on the experience and advice of countries with more advanced economies, including the United States, that call for specialised units to deal with corruption. The Romanian law mirrors this approach.

For the trial of crimes of corruption and of associated crimes, specialised panels of judges may be set up, according to article 15 in Law no. 92/1992 on judicial organisation, republished with the subsequent modifications.

The final judicial decision of sentencing or acquittal may be published in the central newspapers or, as the case may be, local newspapers mentioned in the decision.

### **Overview of cross-border issues**

Cross-border problems are old and well known by all political systems which have succeeded to power over the years in Romania.

As a member of the European Union since 1<sup>st</sup> January 2007, Romania implemented the same approach to criminal behaviour as other members of the EU.

Judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions and includes the approximation of the laws and regulations of the Member States in certain areas. In criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision adopted unanimously, after obtaining the consent of the European Parliament (Article 82 TFEU).

The principle of mutual recognition applies to financial penalties (Framework Decision 2005/214), to custodial sentences or measures involving deprivation of liberty (Framework Decision 2008/909), to decisions on supervision measures as an alternative to provisional detention (Framework Decision 2009/829) and to probation measures and alternative sanctions (Framework Decision 2008/947). A Member State should recognise and execute in its territory orders freezing property or evidence issued by a judicial authority of another Member State in connection with criminal proceedings (Framework Decision 2003/577).

A framework decision aims to ensure that both active and passive corruption in the private sector are criminal offences in all Member States, that legal persons may also be held responsible for such offences, and that the offences incur effective, proportionate and dissuasive penalties (Framework Decision 2003/568). A network of contact points was set up in order to improve cooperation between authorities and agencies of the Member States in preventing and combating corruption (Decision 2008/852). All fraud involving non-cash means of payment (payment instruments, computers and specifically adapted devices) is recognised as a criminal offence and mechanisms are put in place for cooperation between

the Member States to prosecute such offences efficiently (Framework Decision 2001/413). A framework decision aims to approximate the criminal law of Member States in respect of attacks against information systems, and to ensure that such attacks are punishable in all Member States by effective, proportionate and dissuasive penalties (Framework Decision 2005/222).

One of the most important decisions in this matter is the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The purpose of this decision is to step up cross-border police and judicial cooperation between European Union (EU) countries in criminal matters. In particular, it aims to improve the exchange of information between the authorities responsible for the prevention and investigation of criminal offences. The decision sets out provisions with regard to:

- automated access to DNA profiles, dactyloscopic data and certain national vehicle registration data;
- supply of data in relation to major events;
- supply of information in order to prevent terrorist offences; and
- other measures for stepping up cross-border police cooperation.

### **Corporate liability for bribery and corruption offences**

As we mentioned in the 1<sup>st</sup> section of the article herein, the provisions of articles 254-257 in the NCC also apply to the managers, directors, administrators and auditors of trading companies, national companies and societies, autonomous administrations and to any other economic units.

The conditions of the criminal liability for legal persons are stipulated in article 135 of the NCC. The legal entity, except state and public authorities, is criminally responsible for crimes committed in achieving the object of activity or interest or on behalf of the legal person. Public institutions are not criminally liable for offences committed in the exercise of these activities.

### **Criminal liability of legal persons does not exclude criminal liability of individuals who helped to commit the same act**

The main penalty applicable to legal entities is a fine. Additional penalties provided by the NCC are: dissolution of the legal person; suspension of activity or one of the activities of the legal entity for a period of 3 months to 3 years; closure of working points of the legal entity for a period of 3 months to 3 years; prohibition from participating in public procurement procedures for a period of 1 to 3 years; placing under judicial supervision; and posting or publication of the judgment of conviction.

According to the provisions of article 137 of the NCC, the amount of the fine is determined by the day-fine system. The appropriate amount of the fine applicable to the legal entity is calculated by multiplying the day-fine sum with the number of days. A day-fine is between 100 and 5,000 RON and the days-fine is a number between 30 days and 600 days.

The court shall determine the number of days-fine in view of the general criteria for individualisation of punishment. The days-fine boundaries are as follows:

- a) between 60 and 180 days-fine, if the law provides for a punishment fine only offence;
- b) between 120 and 240 days-fine, if the law provides imprisonment not exceeding five years, or alternatively a penalty fine;
- c) between 180 and 300 days-fine, if the law provides imprisonment not exceeding 10 years;

- d) between 240 and 420 days-fine, if the law provides for imprisonment of up to 20 years; and
- e) between 360 and 510 days-fine, if the law provides for a prison sentence of more than 20 years or life imprisonment.

When the legal person who committed the offence has sought to obtain a pecuniary advantage, special days-fine limits prescribed by law for the offence committed may be increased by a third, without exceeding the maximum fine as stipulated in article 137 of the NCC. In establishing the fine, the court will take into consideration the value obtained or the pecuniary advantage sought.

According to article 43, paragraph 5 of the NCC, if after the previous sentence has been served or deemed to be executed in the state, a new offence is committed, the special limits of the punishment stipulated by law for the new offence shall be increased by half.

For offences subject to the article herein, the punishment is imprisonment from 2 to 7 years, and the quantum of the fine is between 18,000 and 1,500,000 RON. If paragraph 5 of article 43 is applicable, the maximum fine is 2,000,000 RON. In the event that the offence is committed as stipulated by article 137 paragraph 5, the maximum fine is 3,000,000 RON.

### **Proposed reforms/The year ahead**

The New Criminal Code (Law no. 286/2009) and The New Criminal Procedure Code (Law no. 135/2010) entered into force at the beginning of this year (1<sup>st</sup> February 2014).

Taking into account the fact that the new criminal provisions are directly applicable, the introduction of the new criminal legislation has proven to be a major undertaking.

The High Court of Cassation and Justice has continued over the years to implement organisational measures to prevent delays in high-level corruption trials. Importantly, the High Court has also continued to propose solutions to procedural loopholes allowing for procrastination, which had previously been a feature of high-level corruption cases. For example, on the basis of the proposal of the High Court, article 48(1) of the New Criminal Procedure Code was amended, providing that the court of first instance maintains its competence *ratione personae*, even when the defendant no longer has a status requiring High Court consideration, once the indictment has been read before the court (the initial stage of the trial in first instance). The High Court is also closely monitoring cases that might reach prescription earlier following the new Criminal Code. Maintaining five-member panels, for final instance, which was in question earlier in the year, has not had any discernible impact on the progress of cases.

Since the end of 2011, the SCM (Superior Counsel of Magistrates) also monitors the timeliness of high-level corruption cases, with a report of the Judicial Inspection twice a year.

One example of the shortcomings of the new criminal provisions is article 289 of the NCC. This article was criticised by authors of criminal law because the new law, as opposed to the old one, doesn't incriminate the lack of rejection of the promise of money or other benefits offered. This legal provision was also criticised because the punishment provided by law is considered to be too mild considering the social implications that arise from the committing of this type of crimes.

Therefore, any and all changes to be made to the NCC shall be made taking into consideration how the criminal law authors, the prosecutors and the courts of criminal law will assess the gaps in legal provisions by interpreting and applying them to concrete cases arising in practice.

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Prior to this position, he was the managing partner of Garrigues in Romania, which originally merged with Mares & Asociatii in 2008. When Garrigues pulled out of Romania, Mihai joined as Of Counsel, the Romanian law firm, Musat & Asociatii, being in charge with the “Iberian desk”, before re-launching his firm in September 2011.

Since 2014, his practice focuses mostly exclusive on criminal defence for senior executives, entrepreneurs, major industrial groups, financial institutions and large international and domestic companies, in a wide range of matters involving accounting, financial, securities and tax fraud; bribery, antitrust and environmental violations.

In addition, he advises clients in internal investigations and audits involving money laundering, fraud and other corporate misconduct. In international criminal law, Mihai acts in international corruption, freezing of assets, multi-jurisdictional investigations and extradition.

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