



Submission of The Competition Authority on the General Scheme of the Intoxicating Liquor Bill, 2005

Submission S/05/005

May 2005



The Competition Authority
An tÚdarás Iomaíochta

Summary

- A.1 The Competition Authority welcomes the opportunity to comment on the draft Intoxicating Liquor Bill, 2005 ("the Bill"). The Authority has been a strong advocate for the overhaul of Irish licensing laws for many years.¹ The current licensing regime imposes avoidable costs in excess of €1 billion on the economy, leads to higher alcoholic and non-alcoholic drinks prices, reduces publicans incentives to innovate, deprives the exchequer of revenue, and has if anything aggravated inappropriate use of alcohol.
- A.2 The reforms proposed in the Bill are welcome, but they will have at best a modest positive impact on competition. A small number of changes to this legislation could have a significant positive effect on competition. In particular –
- **Amend Head 34 to remove the requirement to extinguish an existing licence in order that a new licence may be issued.** The Bill's failure to remove the limit on the number of licences represents a missed opportunity for moving towards a regulatory system that works for society as a whole, rather than for a small number of existing businesses.
 - **Amend the First Schedule to remove a local authority's ability to determine whether a café bar licence shall be granted in the whole, or a specified part, of its administrative area by adopting a resolution in the manner specified in section ([Head 90(7)]).** The Authority welcomes the proposed new café bar licence, and urges that café bars ought to be given a fair opportunity to get established, without being overly-restricted by the licensing regime proposed. Local authorities should have the same role, e.g. Planning and Development, in the granting of a café bar licence as in the granting of a public house licence. It is not clear why they are given extra powers in the granting of a café bar licence.
 - **To ensure that the planning process cannot be abused in the case of new establishments, provide clear definitions of relevant terms in the Bill, e.g. "*inconvenience of the premises*", "*persons with a bona fide interest*", etc.**
 - **To protect the integrity of the planning process the Bill should stipulate that any objection to the granting of a new licence must be accompanied, where relevant, by a formal declaration of commercial interest (for example by a potential or actual competitor).**
- A.3 The remainder of this submission addresses these issues more fully. The Competition Authority would be happy to elaborate further on this submission with the Department of Justice, Equality and Law Reform, and indeed to work together with the Department to develop a licensing regime that promotes the rights and welfare of consumers and society as a whole.

¹ See for instance the *Interim Study on the Liquor Licensing Laws and other Barriers to Entry and their impact on Competition in the Retail Drinks Market*, September 1998, available at <http://www.tca.ie>

PART B- Effects on the Irish Economy and Society of the Current Restrictions on Competition

- B.1** The licensing laws as currently constituted preserve a protectionist regime that has been in place since the Licensing (Ireland) Act, 1902. The current licensing system imposes avoidable costs in excess of €1bn on the economy. The quantitative and qualitative restrictions on the issuing of licences ensure that there are significant barriers to entry in the public house market. The most significant barriers to entry stem from:
- The requirement that an existing licence must be extinguished before a new one may be issued.
 - The right of an existing licence holder to object to the issuing of a new licence in the neighbourhood.
- B.2** The barriers to entry in the public house market ensure that existing pubs are protected from competition. By restricting entry and stifling competition, the current licensing system enables publicans to raise the prices of both alcoholic and non-alcoholic drinks and reduces their incentive to innovate and operate efficiently. Between 1993-2003, the bar price of a pint of stout increased by 51.2%. Over the same period, 1993-2003, the Consumer Price Index (all items) increased by just 34.6%². Table 1 and Figure 1 below, illustrate that the publican has been able to pass on costs to the consumer by raising the tax exclusive price of a pint of stout. In fact, the last column of Table 1 illustrates that tax as a percentage of the bar price of a pint has actually fallen from 37% in 1993 to 31.1% in 2003.

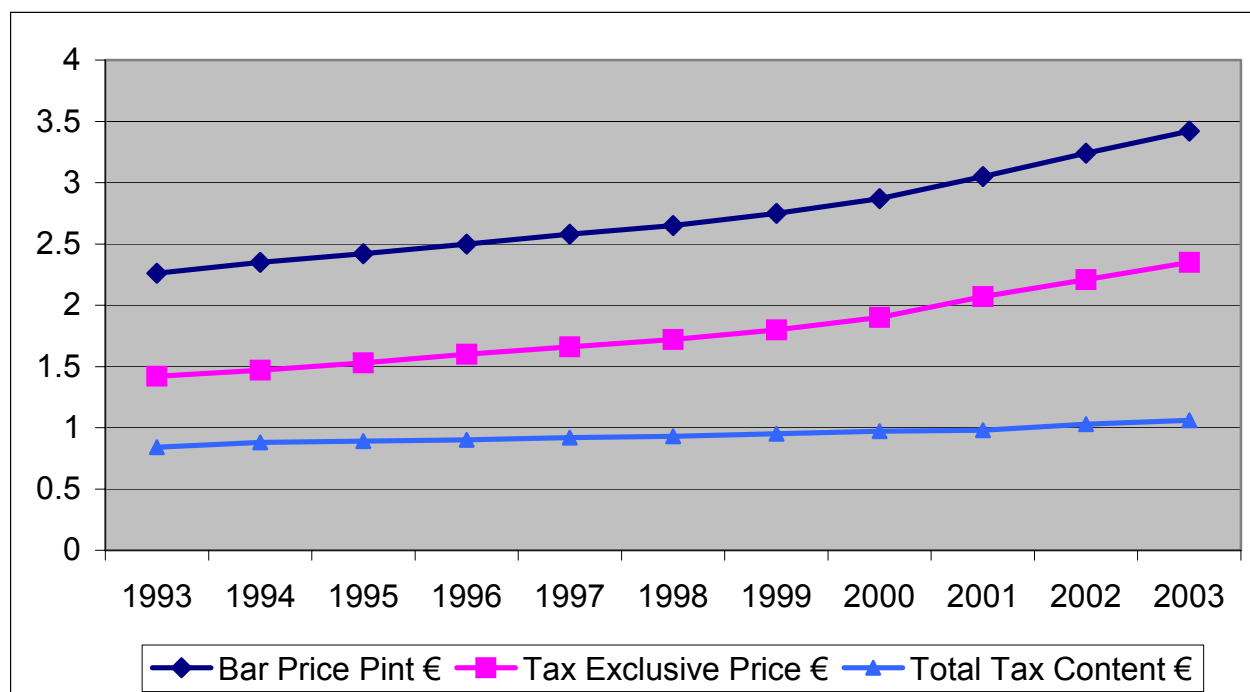
Table 1: Bar Price and incidence of tax per Pint of Stout, 1992-2003³.

Year (Mid Nov)	Bar Price Pint €	Bar Price Pint% Change	Total Tax Content €	Tax Exclusive Price €	Tax Exclusive Price %Change	Tax as % of Price
1993	2.26	5.1%	0.84	1.42	6.8%	37.0
1994	2.35	4.0 %	0.88	1.47	3.3%	37.4
1995	2.42	3.0%	0.89	1.53	3.9%	36.8
1996	2.50	3.3%	0.90	1.60	4.3%	36.2
1997	2.58	3.2%	0.92	1.66	4.1%	35.6
1998	2.65	2.7%	0.93	1.72	3.5%	35.1
1999	2.75	3.8%	0.95	1.80	4.8%	34.5
2000	2.87	4.4%	0.97	1.90	5.5%	33.8
2001	3.05	6.3%	0.98	2.07	8.9%	32.1
2002	3.24	6.2%	1.03	2.21	6.6%	31.9
2003	3.42	5.4%	1.06	2.35	6.6%	31.1

² Data from Revenue Commissioners Statistical Report 2003, available at <http://www.revenue.ie/pdf/statreport2003.pdf>

³ Data from Revenue Commissioners Statistical Report 2003

Figure 1: Bar Price, Tax Exclusive Price and Total Tax Content of a Pint of Stout, 1993-2003⁴



Furthermore, the higher margins on alcohol give publicans an incentive to promote the consumption of alcohol over all other products. In a sector sheltered from competition this has the indirect effect of raising the price of substitute products such as soft drinks. Indeed, a 2003 AC Nielsen market analysis of the retail prices of 13 individual brands of soft drinks across the EU 15 reveals that 12 out of the 13 soft drinks are more expensive in Ireland even when price-adjusted for VAT⁵.

- B.3 The prices of alcoholic and non-alcoholic drinks in Ireland are reflective of the high costs inherent in the sector, which are in turn passed on to consumers. The biggest cost by far is the artificial value of pub licences, which costs the economy in excess of €1 billion. This figure is derived from aggregating the estimated value of all individual on-licences in the State⁶. The value of pub licences represents the capitalised value of the stream of monopoly profits from the drinks industry.

⁴ Data from Revenue Commissioners Statistical Report 2003

⁵ *Alcoholic and Non-Alcoholic Beverages and the Consumer*, prepared for the Consumer Strategy Group by Forfas, 2004, available at <http://www.irishconsumer.ie/supportingresearch.asp>

⁶ Assuming an amount of €130,000 per on-licence by the number of on-licences in 2003 (9,731), the cost to the economy is €1.265 billion. Auctioneering sources in 2001 indicated to the Competition Authority that on-licences are likely to be valued at between €130,000-140,000. Thus this a conservative estimate of the cost to the economy. It should be noted that the simple calculation carried out here implicitly assumes that liberalisation of entry would reduce the value of licences to zero. This, however, may not be the case. Apart from the quantitative restrictions on the number of operators allowed to enter the market, there are other barriers to entry. For example, a new entrant must comply with planning laws. This kind of entry barrier may have the effect of giving a licence a positive value. For this reason the above figures may tend to over-estimate the true potential gains from liberalisation. On the other hand, a second factor that would tend to

- B.4 It is difficult to justify the restrictions on the number of outlets by arguing that the monopoly profits that they award to publicans can control consumption in the same way as indirect taxation. Restricting the number of outlets is far inferior to direct taxation because the revenue goes to the industry rather than the Exchequer. It amounts to private taxation by publicans in place of public taxation. This deprives the Exchequer of money that could be used in the interests of the public.
- B.5 The existing State restriction on the number of licences creates a barrier to entry, and has led to a situation whereby areas that have witnessed a burgeoning in population are “under-pubbed”. Table 2 illustrates the distortionary effect the existing legislation has had on the distribution of pub licences in the State. Dublin with approximately 35% of the population is served by only 9% of the total number of pub licences in the State. The corresponding number for off-licences is more reflective of underlying demographics.

Table 2: Distribution of On and Off- licences⁷

	Pub Licences	%	Off-Licences	%
Dublin	808	9%	282	29%
Outside Dublin	8642	91%	696	71%

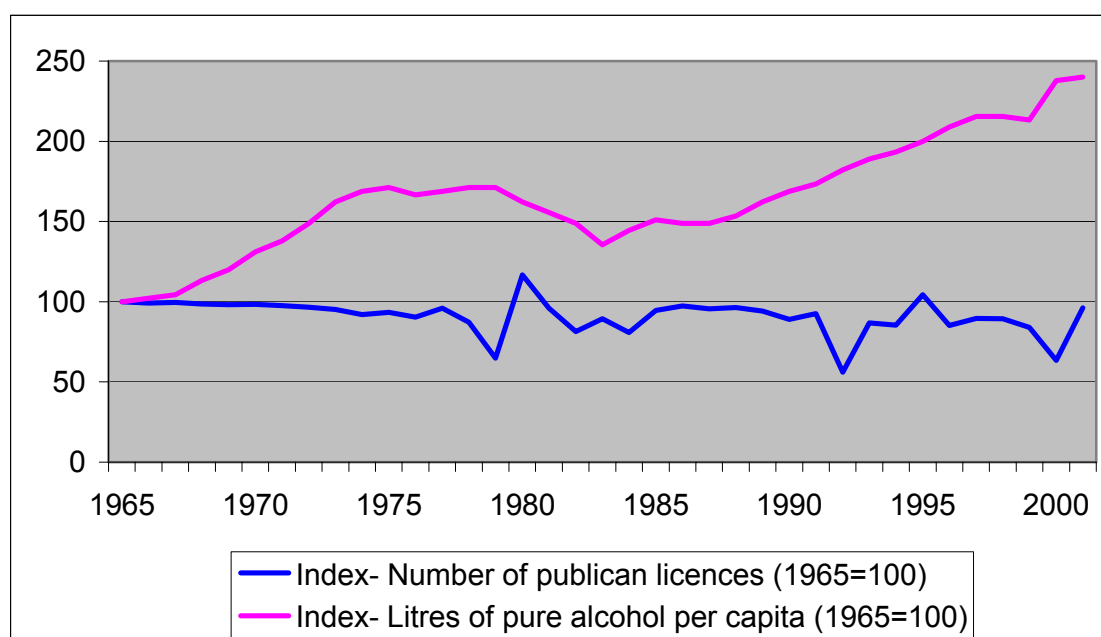
- B6. Where demand has increased, existing premises have responded by growing in size, resulting in the demise of the traditional pub and the emergence of very large drinking establishments or “super-pubs”. When entry does occur there is a tendency for new entrants to set up “super-pubs”. The reason is that it may simply not be viable to open smaller establishments. To cover the large sum that must be paid to acquire an existing licence, new entrants must maximise its use, thus creating a tendency to open larger venues and focus on the exclusive sale of alcohol and not, as is normal in other countries, the sale of alcohol in conjunction with other social activities. The policy of limiting the number of outlets has inflated the price of such licences and forced existing outlets to expand in size. This has distorted the evolution of the market.
- B7. In addition to all of these harmful effects, the restriction on the number of licences has clearly failed to meet its fundamental objective of controlling inappropriate consumption. Indeed, there is no evidence whatsoever that the problems of inappropriate consumption are greater outside Dublin, where there are ample outlets, than in Dublin, where the impact of the restrictions is most pronounced. This central point should be continually kept in mind, i.e. there is no evidence of a direct correlation between the number of licences granted and the incidence of alcohol abuse and associated social problems.

mitigate this problem arises because of what is referred to as dead-weight loss. Dead-weight loss refers to that portion of the gains from trade that are lost by society, i.e. by both consumers and producers. Liberalisation of entry would re-capture this loss. Thus, if these factors tend to cancel each other out, the above figures represent a reasonable estimate of the potential gain available from the liberalisation of entry.

⁷ The figures supplied by the Revenue Commissioners are from September 2000. Given that the restriction on the number of licences has remained in place, the licence figures will have remained largely the same.

Figure 1 illustrates that the current restrictions on the number of licences has failed to curb alcohol consumption. Since the 1960s per capita consumption of alcohol in Ireland (in terms of litres of pure alcohol) has more than doubled. At the same time the number of pub licences has remained practically static⁸.

Figure 2: Trend in Publican Licences and Per Capita Consumption of Alcohol (1965-2001)⁹



- B.8 In summary, the current licensing regime imposes avoidable costs in excess of €1 billion on the economy, leads to higher alcoholic and non-alcoholic drinks prices, reduces publicans incentives to innovate, deprives the exchequer of revenue, and fails to control inappropriate consumption of alcohol. The problems identified in the current licensing regime, as laid out above, have also been recognised in international and domestic studies.
- B.9 The 2001 OECD Report on Regulatory Reform in Ireland noted that *"The political influence of the interests who profit from the current system prevents the most straightforward reform, which would be to eliminate quantitative entry controls"*. The OECD report advocated that the State should:
- *"Remove licensing constraints on free entry, particularly those with quantitative limits"*¹⁰.

⁸ The variation in the trend in licence numbers is largely due to failure to renew licences on time.

⁹ The litres of pure alcohol per capita are sourced from *World Drink Trends 2003*, NTC Publications Ltd, UK. The number of publican licences in the State were provided by the Revenue Commissioners.

¹⁰ *Regulatory Reform in Ireland*, OECD Reviews of Regulatory Reform, OECD 2001

B.10 The Consumer Strategy Group ("CSG") Report highlighted that *"Irish consumers pay more for alcoholic and non-alcoholic drinks than their Eurozone counterparts"* and that *"The restrictive on-trade licensing system in Ireland is contributing to these higher prices and facilitating a lack of innovation which would stimulate competition in the market and allow prices to respond appropriately and freely to demand"*. The CSG recommended the following:

- *"Abolish the limit on the number of pub licences awarded"*
- *"Ensure that planning is not used as a barrier to entry in respect of pub and other forms of licence"*¹¹.

Recommendation 1:

The Competition Authority recommends that Head 34 be amended to remove the requirement to extinguish an existing licence in order that a new licence may be issued.

¹¹ Report of the Consumer Strategy Group- *Make Consumers Count: A new direction for Irish consumers*, 2005, available at <http://www.irishconsumer.ie/>

PART C- Café Bar Licence

- C1. The Bill proposes the creation of a café bar licence. In order for a café bar licence to be granted a premises must meet a number of conditions, one of which is that a premises must be less than 130 square metres¹². Given the proliferation of “super-pubs” there may be a case for asymmetric regulation in favour of smaller outlets, to counteract some of the distortionary effects of the current licensing regime.
- C2. As such, provisions in the Bill concerning licences for pubs under 130 sq metres in floor size are likely to be pro-consumer, at least in the short term. The provisions will have two effects:
- To discourage the proliferation of “super-pubs” - where licence holders are incentivised to promote the sale of alcohol above that of other products, with attendant problems for law and order.
 - To encourage the development of Continental-style café bars where alcohol would be served as a “de-mystified” equivalent to non-alcoholic drinks on its own, or along with a meal, as well as newspapers, confectionery, stamps etc. That is, the encouragement of a more relaxed approach to drinking.
- C3. This policy is likely to have beneficial social effects by allowing for the alteration of drinking habits from those more associated with “binge drinking” to those more associated with moderate and social consumption, accompanied perhaps by the consumption of food.
- C4. It therefore seems inequitable and inconsistent that there are more grounds for objection to the granting of a café bar licence than a public house licence. For example, the First Schedule, p. 273, states that “*Any local authority may determine, by adopting a resolution in the manner specified in section ([Head 90(7)]), that café bar licences shall not be granted in the whole, or a specified part, of its administrative area*”. It is not clear why local authorities should have this power in relation to the granting of café bar licences but not pub licences. Local authorities should have the same role in planning and development whether that be for the granting of café bar licences or the granting of pub licences. There is no need for this extra layer of regulation, which is likely to inhibit the development of café bars. This provision risks entirely compromising the Minister’s single biggest proposed reform in the Bill and the Authority recommends that it be removed.

Recommendation 2:

The Competition Authority recommends that the First Schedule be amended to remove a local authority’s ability to determine whether a café bar licence shall be granted in the whole, or a specified part, of its administrative area by adopting a resolution in the manner specified in section ([Head 90(7)]).

¹² The other conditions relating to a café bar licence are: a premises must not be engaged in “take away” sales of food; the supply of hot food and non-alcoholic beverages should be a condition of a café bar licence; consumption on the premises only will be permitted (no off-sales), and the holder of a café bar licence will not be eligible to apply for exemption orders.

- C.5 Special exemption orders will be granted by the District Court to the holder of an on-licence, *"other than the holder of a café bar licence"*, and they will permit the sale and consumption of intoxicating liquor in the licensed premises beyond normal trading hours. The Authority questions why café bar licensees would be ineligible, under Head 90, to apply for exemption orders.

The decision of a licensee to apply or not apply for an exemption order should be made, subject to public nuisance concerns, on the basis of consumer demand rather than by regulation. Given the size of café bars and the facilities which they would provide, it is unlikely that exemption orders would be sought for anything except small to medium sized family celebrations or local association or club social events where it is likely that a substantial meal will be served. This provision is unnecessarily restrictive of competition and the Authority recommends its removal – there appears to be no valid reason why café bars should be prevented from applying for exemption orders under Part 5, Chapter 2.

Recommendation 3:

The Competition Authority recommends that Head 90 be amended to remove the reference to *"other than a café bar licence"* from the definition of a *"special exemption order"*.

PART D – Qualitative Restrictions

Abuse of the Objection Process

- D.1 Within the finer detail of this extensive Bill there are many restrictions, requirements and peculiarities which are unnecessary to ensure a socially responsible system of regulation, and which are open to abuse by those who seek to protect their own interests in lieu of a socially responsible licensing regime. Only those qualitative, objective and transparent criteria directly relevant to the social dimension of the sale of alcohol should be addressed by legislation. The inclusion of other restrictions not directly related to the regulation of quality, consumption patterns, and access by minors, should be carefully avoided.
- D.2 The Authority welcomes the removal of the right to object to the issue of a new public house licence on “*adequacy of supply*” grounds. This removes one of the most blatant examples of incumbent bias in the statute book. It should be for market forces, not the judicial system, to decide whether a new enterprise will succeed or fail. However it is disappointing to note that the “*adequacy of supply*” ground for objections has been retained in relation to general exemption orders (Head 91) and the Authority recommends that it be removed.

Recommendation 4:

The Competition Authority recommends that Head 91 be amended to remove the “*adequacy of supply*” grounds for objection.

- D.3 There is a lack of clarity in the definition of certain terms in the Bill, which risks allowing incumbents to restrict entry. The Bill provides that the courts may allow an objection to the application or renewal of a licence on a number of qualitative grounds. Among these are the ability to object to an application or renewal based on –
- “*the unfitness or **inconvenience** of the premises*”¹³
 - “*an **undue risk** of either public nuisance or of a threat to public order or safety*”¹⁴.

The Authority would be concerned that retaining undefined grounds along these lines may be open to potential abuse. There is a compelling need to ensure that these provisions will not, because of their lack of definition, be manipulated in order to lead to precisely the same outcome as the old “*adequacy*” requirement, but by different means.

- D.4 The same concern arises with the use of vague terms such as “*suitability of the premises*” (e.g. Heads 35, 38, 39, 57, 61, 63), “*inhabitants of the locality*” (e.g. Heads

¹³ Heads 34, 63, 169, 175

¹⁴ Head 34, 43, 46, 53, 63, 72, 78, 91, 169, 175

34, 35, 46, 91 167), “*peaceable and orderly manner*” (Head 53), “*disorderly manner*” (Head 175) and “*person with a bona fide interest*” (Heads 53, 175). General terms like those mentioned above simply must be defined, if situations of potential abuse or manipulation are to be avoided.

Recommendation 5:

To ensure that the planning process cannot be abused in the case of new establishments, provide clear definitions of relevant terms in the Bill, e.g. “*inconvenience of the premises*”, “*persons with a bona fide interest*”, etc.

Recommendation 6:

To protect the integrity of the planning process the Bill should stipulate that any objection to the granting of a new licence must be accompanied, where relevant, by a formal declaration of commercial interest (for example by a potential or actual competitor).

PART E – Other Competition Issues

New Provisions and Licence Fees

- E.1 Currently there are no specific provisions in the licensing laws to meet the needs of catering and special events companies. Thus, the Authority welcomes the introduction of a caterer's licence (Heads 69-72). The Authority also welcomes the Bill's proposal (Heads 74 – 78) that a new annual licence be introduced for retailers engaged in distance sales, predicated on the assurance that applicable licence fees be comparable to existing off-licence fees.
- E.2 From a *better regulation* point of view, the general approach should be that proposals are revenue-neutral. A policy of "taxation by regulation" should be avoided. In other words, any licence fees should be directly related to the cost of providing the licence (including the costs of enforcement), rather than being seen as a source of revenue to the State. They should not be so high as to deter market entry to individuals interested in pursuing a career in the licensed trade. The reverse also applies – savings for operators, e.g. nightclub operators not having to obtain special exemption orders (Part 2, Chapter 9) – should have no bearing on the licence fee to be charged under the new regime.

Anomalies

- E.3 As long as there are special regimes, special licences and exemptions etc, in the licensing laws, anomalies will arise. For example, Head 159 (Issue of licence to bus station) applies a special regime to CIE's station at Busaras. It is not clear why other bus stations could not also be licensed, regardless of whether they are State-owned or not. It is also difficult to see why concert halls are in a different situation to theatres, which have their own licensing regime. There is still an opportunity in the Bill to rectify this kind of anomaly, and this opportunity should be taken.

PART F- Conclusion

- F.1 The reforms proposed in this Bill, while welcome, do not go far enough to create effective competition and the problems with the existing system will largely continue. A number of small changes to this legislation could have a significant positive effect on competition. The Competition Authority's recommendations are-

Recommendation 1:

Amend Head 34 to remove the requirement to extinguish an existing licence in order that a new licence may be issued.

Recommendation 2:

Amend the First Schedule to remove a local authority's ability to determine whether a café bar licence shall be granted in the whole, or a specified part, of its administrative area by adopting a resolution in the manner specified in section ([Head 90(7)])

Recommendation 3:

The Competition Authority recommends that Head 90 be amended to remove the reference to "*other than a café bar licence*" from the definition of a "*special exemption order*".

Recommendation 4:

The Competition Authority recommends that Head 91 be amended to remove the "*adequacy of supply*" grounds for objection.

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