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# The Distribution of the Burden of Proof in EU Antidiscrimination Law

Dr. Neža Kogovšek Šalamon
Vise-president, Constitutional Court of the Republic of Slovenia
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## Evidential barriers in discrimination cases

- Difficulties to prove discrimination
- Imbalanced (economic) power relations between the victim and the one that discriminates
  - E.g. employee – employer; company – consumer
- Lack of evidence, documents, statistics, information possessed by the victim
- Lack of witnesses and written documentation on discrimination
- Non-transparent policies of employers and companies
- Frequent usage of pretexts to keep discrimination covert

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# Overcoming the barriers

Tools developed by CJEU caselaw to ensure effectiveness of legal protection from discrimination:

- Respecting the principle of effectiveness of the legal protection
- Shifting the burden of proof
- Statistics
- Discussions concerning duty to disclose

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# Principle of effectiveness

**ECJ Case *Johnston*, C-222/84 (1986)**

„…it must be borne in mind first of all that article 6 of the Directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination ' to pursue their claims by judicial process'. It follows from that provision that the Member States must take **measures which are sufficiently effective to achieve the aim of the Directive** and that they must ensure that the rights thus conferred may be **effectively relied upon before the national courts** by the persons concerned.

The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in **Articles 6 and 13 of the [ECHR]** as the European Parliament, Council and Commission recognized in their joint declaration of 5 April 1977 (Official Journal c 103 , p . 1) and as the Court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in Community law.“

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# Principle of effectiveness – a fundamental right

- Article 47 EU Charter of Fundamental Rights

„Everyone whose rights and freedoms guaranteed by the law of the Union are violated has **the right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.“

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# The aim of the shift rule: Distribution of duties

The aim is to **remedy the imbalance** and compensate for the differences in (economic and evidentiary) power by

**distributing duties** between parties of a dispute in respect of

presenting evidence that are

**capable of demonstrating** a set of facts on grounds of which

the court can conclusively conclude with the acceptable degree of likelihood that the claim of discrimination is (not) justified.

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# The key components of the rule

- Burden of proof distributes rights and duties between
  - a plaintiff (applicant),
  - a respondent (defendant) and
  - a trier of fact (court, tribunal)

in relation to

  - the task of **production** of evidence
  - the task of **persuasion** through evidence

- The two tasks are functionally separated:
  - the burden can be redistributed in relation to the responsibility of producing evidence without redistributing the burden of persuasion

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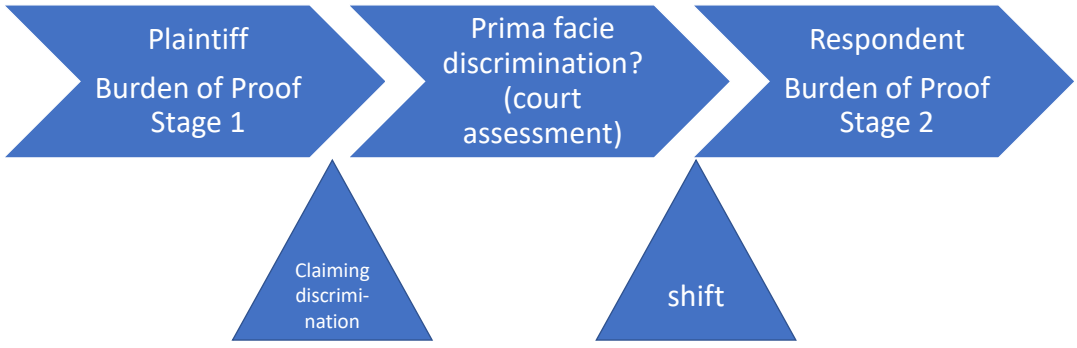
# Schematic view

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# Shifting burden of proof dilemmas

- What kind of statements by plaintiff are required to establish prima facie discrimination?
- What kind of evidence does the plaintiff need to produce?
- How far does the comparability of the groups need to be proven by the plaintiff?
- If statistics are provided for the purpose of proving discrimination, how complete do they need to be? What proportion of the allegedly discriminated group do they have to include?

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# The range of possible "prima facie" assumptions

**Requirement to produce evidence and statements to allow to proceed/possibly shift the production burden**

- e.g. evidence about certain facts allowing the court to make conclusions about those facts
- e.g. evidence demonstrating the existence of certain facts showing the claim is not manifestly unfounded or implausible:
  - by eliminating the most likely justification of the decision under dispute
  - facts allowing a reasonable person to be suspicious that a decision under dispute is questionable

**Requirement to produce evidence to persuade and shift the burden**

- to produce evidence about certain facts of persuasive force allowing an adjudicator to conclude that it is:
  - plausible to assume that the claimed violation could have occurred
  - reasonable to assume that the claimed violation
    - did occurr
    - conceivably occurred
    - probably occurred

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# Shifting the burden of proof (Stage 1)

ECJ Danfoss case (C-109/88, 1989)

- There was evidence that the average wage for women was 6.85% lower than that received by men working for the same employer
- Due to a complete lack of transparency within the employer‘s pay system it was not possible for the claimants to prove definitively that women were paid less in respect of each element of their remuneration.

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# ECJ Danfoss case (C-109/88, 1989)

- The court held: the burden of proof in such circumstances rests initially with the claimants to demonstrate that a relatively large proportion of women were paid less on average than men.
- Then the burden shifted to the employer to demonstrate that there has been no discrimination
- The justification for this rule was to provide women with **an effective means** of enforcing the principle of equal pay.
  - Article 6 of the Equal Pay Directive – requires effective means for ensuring equality.

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# ECJ Danfoss case (C-109/88, 1989)

Paras. 14 and 15:

„The concern for effectiveness which thus underlies the directive means that it must be interpreted as **implying adjustments to national rules** on the burden of proof in special cases where such adjustments are **necessary for the effective implementation** of the principle of equality."

„To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees **the employer will have to indicate** how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent."

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# ECJ Enderby case (C-127/92, 1993)

- There was evidence that speech therapists, who were mostly women, were paid less by the National Health Service (NHS) in Britain than pharmacists, who were predominantly male.
- However, the female claimants could not go one step further and prove that the difference in pay arose because of discrimination.
- ECJ: There was a prima facie case of discrimination and as such the burden of proof shifted to the NHS to prove that there was no sex discrimination.
- The justification for this approach was the need to provide women with an effective means to establish discrimination.

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# ECJ Enderby case (C-127/92, 1993)

Paras. 18 and 19:

„Where there is a **prima facie case** of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be **unable to enforce** the principle of equal pay before national courts if evidence of a prima facie case of discrimination **did not shift** to the employer the onus of showing that the pay differential is not in fact discriminatory".

„…where **significant statistics** disclose an appreciable difference in pay between two jobs of **equal value**, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on **objectively justified factors** unrelated to any discrimination on grounds of sex."

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# Lessons from early case law

- To establish **prima facie discrimination**:
  - the plaintiff must produce evidence of facts allowing (at least temporarily) a **suspicion that it is plausible** that the treatment under dispute is related to the use of prohibited criteria
  - there must be **a lack of transparency** in combination with the plausibility of the use of prohibited criteria require the shift of the burden of proof
  - plausibility can be shown through **statistics**
  - the plaintiff has a right to require the shift; the adjudicator has a duty
  - shifts the burden of **production** and **persuasion**
  - If the respondent fails to fulfil his burden of proof the adjudicator has a duty to deliver judgment for the plaintiff and find discrimination.

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# Codification of the shift of the burden of proof

- The first Directive to explicitly address the burden of proof in discrimination cases introduced in December 1997 in respect of sex. The directive which was later recast stated:

**„Article 4**

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.“

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# Justification

The justification for this provision was, the same as in the case law, the **principle of effectiveness**, as evident from the **directive‘s recitals**:

„(17) … plaintiffs could be **deprived of any effective means** of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory“

„(18) …the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment **to be applied effectively**, the burden of proof must shift back to the respondent when evidence of such discrimination is brought“

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# Provisions on burden of proof in force – same wording

- Article 8 in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Race Equality Directive");
- Article 10(1) in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Employment Framework Directive");
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("the Recast Directive").

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# Transposition duties

- The directives require the member states to **adapt** their national procedural rules on evidence, and ensure they **conform** with the provisions of the directives.
- The member states may adopt **more favourable** procedural rules on evidence in respect of the plaintiffs.

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# Further CJEU caselaw relevant for establishing prima facie discrimination

- C-381/99 Brunhoffer
- C-17/05 Cadman
- C-54/07 Feryn
- C-104/10 Kelly
- C-415/10 Meister
- C-81/12 Accept
- C-83/14 CHEZ
- C-531/15 Otero Ramos

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# ECJ Brunnhofer case (C-381/99, 2001)

- This was also an equal pay case.
- The court stated that once a woman could establish that she was "comparable" to a man and she was paid less, then that was sufficient to shift the burden of proof.
- Para. 54: „…where an undertaking applies a system of pay with a mechanism for applying individual supplements to the basic salary, which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men".
  - Hence, in such cases there is no need to compare individual components of the pay (as in *Danfoss* and *Enderby*), but the average salary.

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# ECJ Brunnhofer case (C-381/99, 2001)

Para. 58:

„It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex."

Possible defenses of an employer:

- Establishing that the activities of the plaintiff and the chosen comparator were not comparable. (para. 61)
- Stating objective factors, unrelated to sex, to explain the higher payment of the chosen comparator. (para. 62)

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# Opinion of Advocate General in *Brunnhofer*

„It is therefore for Ms Brunnhofer to demonstrate that her work is the same or of equal value and that different pay is awarded for it. The fact that classification in the same job category may be evidence that the work is the same or of equal value does not release the person who believes that she is the victim of pay discrimination from the obligation to prove with detailed facts and evidence that the work really is the same or of equal value in the case in question. It is then for the employer to demonstrate that there are grounds which can justify the difference in pay."

(para. 20)

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# Lessons from equal pay cases:

- There needs to be a **comparability of work posts and the actual work**. In this case a mere difference in treatment between a man and a woman is enough to shift the burden of proof. (*Brunnhofer*)
- If the remuneration policy is **not transparent**, the average salary of women is compared to that of men. (*Brunnhofer)* Lack of transparency is sufficient for the shift of burden of proof (*Danfoss*).
- **Occupational segregation**: The burden of proof is shifted where there are two professions within one organisation which are essentially divided along gender lines, and the "male" profession is paid better than the "female" profession (*Enderby).*

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# CJEU, ACCEPT case (C-81/12, 2013)

There are also relevant lessons from cases not related to gender:

- **Public statements** of a majority shareholder of the football club on who will not be hired by the football club **were sufficient for shifting** the burden of proof to the club.
- Even if there was no footbal player who was directly affected.
  - The case was initiated by an NGO (actio popularis case)
- It was relevant that the football club did not distance itself from the statements of the majority shareholder (public perception and reactions of the respondent were important for the case).

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# CJEU, *Firma Feryn* case (C-54/07, 2008)

- A public statement of the company owner that he will not hire Moroccans because his customers are against them, was sufficient to shift the burden of proof to him.
- Even if there was no candidate for employment who would be directly affected.
  - The case was initiated by an NGO (actio popularis).

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# CJEU, CHEZ case (C-83/14, 2015)

- The plaintiff affected was not Roma but the practice was applied in a neighbourhood with large Roma population. The court stated:

„…the mere fact that the district at issue in the main proceedings is also lived in by inhabitants who are not of Roma origin **does not rule out that such a practice was imposed** in view of the Roma ethnic origin shared by most of that district's inhabitants."

- The fact that the plaintiff was not Roma did not preclude the shifting of the burden of proof, should the referring court establish there was prima facie discrimination.
- The shift phase: In this case the respondent would have the task of rebutting the existence of a breach, by proving that the practice is in not founded on the fact that the districts are inhabited mainly by Roma, but exclusively on objective factors unrelated to any discrimination on the grounds of racial or ethnic origin.

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# Degree of certainty on Stage 1 (standard of proof)

- What level of certainty needs to be ensured on Stage 1 of the shifted burden of proof?
- The wording of the Directives requires the claimant to prove facts from which it "may be presumed" that there has been discrimination. What standard of proof does this wording require?
- **No court case yet to clarify this.** See AG Kokott's Opinion in C 394/11 Belov v CHEZ Elektro Balgaria AD (20 September 2012). Key points:
  - Requiring a high degree of certainty of discrimination before the burden shifted „would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant".
  - This would be the same as if the normal procedural rules on evidence applied, without the shift.

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# Indirect discrimination – early caselaw

- The most difficult barrier for claimants alleging indirect discrimination in shifting the burden of proof is the requirement to establish a presumption that the policy, criterion or practice puts the protected group at a "particular disadvantage".
- What does particular mean? How much is that in numbers, statistics? The answer is not specific but descriptive.
- Many of the older decided cases which consider the question of what might be needed to show "disadvantage" were determined under different and more stringent legislation.
- For example, in *Bilka-Kaufhaus* (C-170/84, 1986), an equal pay case concerning the exclusion of part-time employees from an occupational pension scheme, the CJEU required a finding that a "much lower proportion" of women than of men worked part-time in order to establish the required disadvantage.
- Seymour Smith (C.167/97, 1999): „considerably smaller percentage of women than men".

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# New test from recent case law

- There is no clear guidance from the CJEU on what might be required to show a prima facie case under the current test.
- However, the replacement of the words “a substantially higher proportion” with the simpler requirement for “a particular disadvantage” suggests that it may not be necessary to conduct a detailed statistical analysis of the advantaged and disadvantaged groups in every case.
- In *Danfoss*, the statistical discrepancy was significantly lower than it was thought to be required in older indirect discrimination cases, such as *Bilka Kaufhaus* and *Seymour Smith*.

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# Rebutting the burden of proof (Stage 2, the shift phase)

- Employers might object that it is difficult or impossible to prove negative facts (that they did not discriminate)
- Usually proving the „negative“ can be done by proving the „positive“, e.g.
  - Proving higher job performance of a comparator comparing to the plaintiff
  - Proving differences in work posts between the comparator and the plaintiff
- Failure to prove the positives:
  - In *Firma Feryn*, the company did not employ any Moroccans, however this might have been for unrelated reasons, e.g. because no Moroccan has applied for the job. To rebut the burden of proof, the company would have to show that their recruitment policy was compliant with prohibition of discrimination.
  - In *Accept*, if the football club had shown that they were taking positive steps to prevent discrimination and would distance themselves from the statements of the majority shareholder, they would discharge the burden of proof.

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# Rebutting the burden of proof (Stage 2, shift phase)

- The standard of proof required after the shift: strong but not full
  - Obligation to produce evidence of "objective factors" used in decision-making
  - Employers are obliged to make the process transparent
  - The produced evidence must conclusively persuade the court that considerations related to sex were not systematically used by employer to provide advantage to men over women
  - The facts must be "objective" – proven as actually related to real business needs
- NB: There is always a possibility of return of the burden back to the plaintiff based on the court's assessment.

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# Is there a legal duty to produce evidence by respondents?

- Shifting burden of proof will help plaintiffs who are able to provide at least some evidence that supports their claims.
- What if no evience is available? Usually the respondent in the case has more evidence in their possession than the plaintiff. Is the plaintiff legally entitled to compell the respondent to disclose and provide evidence? **Is there a duty to produce**?
- Formally no. The Directives are careful not to interfere with the procedural rules of the member states. CJEU also did not recognize this right.
- However, refusal of the respondent to disclose evidence might be in contradiction with the principle of effectiveness

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# CJEU Kelly case (C-104/10, 2011)

- The plaintiff's claim that a university has to disclose information based on which he could prove he was discriminated against, was refused.
- He argued that refusal to disclose information was contrary to Directive 97/80 and the provision on shifting the burden of proof. He claimed that refusal to disclose information prevented him from fulfilling the first stage of the burden of proof and from shifting it to the respondent.
- **The court did not agree**, however, it did indicate that member states are obliged to ensure that its rules of procedure and evidence do not prevent individuals from being able to **effectively pursue claims** for discrimination.

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# CJEU Meister case (C-415/10, 2012)

- In this case the court repeated that the defendant's refusal to grant any access to information may **undermine the effectiveness** of the shifting burden of proof.
- Repeated that the refusal of a job candidate without any explanation provided **does not entitle** the candidate to have access to information on whether the employer employed another candidate.
- Added that refusal of the employer to disclose information may be taken into account in the context of establishing facts from which it may be presumed that there has been discrimination.
- Hence, a failure to provide disclosure is of itself **relevant for Stage 1** and for the assessment of prima facie discrimination.

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# CJEU Otero Ramos case (C-531/15, 2017)

- **The case of a breastfeeding worker** (a nurse working in emergency ward) who asked the employer for a risk assessment of her work post for her health and safety at work
  - Her employer issued a certificate there is no risk, but her line manager issued a statement that there are health risks due to lactation
  - The national court dismissed her claim. The appeals court referred the question to CJEU
- **CJEU decision**: A **failure to assess the risk** posed by the work to breastfeeding workers is to be regarded as **less favourable treatment** of a woman related to pregnancy and constitues **discrimination on the grounds of sex**
- Court: **The Stage 1 burden of proof was on the plaintiff** – if she can show that work assessment has been insufficient this is prima facie discrimination. It is then for the employer to show there has been no discrimination **(Stage 2)**.

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# Differences among plaintiffs

- The difference is if the plaintiff is already „in“ (e.g. working for the employer) or not. The former will have much better access to information comparing to the latter.
- Hence, the duty to produce evidence and information is very relevant particularly for those complaining against discrimination from „outside“ (e.g. candidates for employment).
- Also, there is a reluctance of national courts to make disclosure orders if that could lead to the disclosure of confidential data relating to identifiable individuals who are not party to the proceedings

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# Final remarks – Stage 1

**Prima facie discrimination** may be established based on facts:

- The person applied for a position, has a group membership, has required qualifications, was rejected but the position remained open.
- Lack of transparency in recruitment process
- Group-based statistics
- History of respondent behaviour
- Inconsistencies in practices leading to the lack of credibility of the respondent
- General policies of the respondent, their public statements and reactions to accusations

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# Final remarks – the shift phase (Stage 2)

- Full weight of the burden of proof (the burden of persuasion, not mere production)
- The respondent needs to prove absence of discrimination by a clear and convincing evidence the existence of actual objective reason, that is not in any way related to any discriminatory ground
- If there is unequal treatment: The objective reason that respondent offered as explanation for criterion or practice must
  - – serve actual business need and
  - – the disputed practice must be appropriate and necessary for effective realization of that need (legitimate aim).

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Thank you!

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