

Chapter 7

The interface between member states and the European Union

An increasing proportion of national regulations originate at EU level. Whilst EU regulations¹ have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU legislation are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market and avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU law. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Assessment and recommendations

The establishment of clear and formalised structures for the management of EU regulations has helped to strengthen Irish performance. Co-ordination and monitoring have been improved. A range of processes and structures have been put into place including EU specific co-ordinating committees within the executive which meet on a regular basis, as well as parliamentary committees, guidelines to departments on best practice in transposition, and the introduction of an electronic database “EU Returns”, to co-ordinate and monitor information. The EU Returns system is particularly striking relative to other EU countries, allowing departments to run reports on transposition and infringement proceedings, and the centre to monitor the overall picture. The structures that are now in place have forced departments to adopt more standard procedures (requiring them, for example, to prepare reports to the parliament), and have enhanced Parliamentary scrutiny of EU developments. The Department of the *Taoiseach* plays a growing role in co-ordination, alongside the Department of Foreign Affairs. Ireland has reduced its transposition deficit (now under the 1% target set by the Commission).

Resource constraints require a stronger and clearer approach to prioritisation. Departments can only deploy a limited number of staff on EU issues. This fosters flexibility and an ease of communication as the network of officials on EU affairs is small. However, it can create difficulties to respond adequately to developments and thus makes prioritisation a necessity. There is a need to prioritise not only on the immediate agenda but

also in terms of Ireland's strategic priorities- what are the most important issues for Ireland?

Recommendation 7.1. Prioritise key areas of EU activity for Ireland so that time and resources can be directed toward these areas.

The application of RIA to EU regulations is far from systematic. The RIA guidelines are quite clear as to the use of RIA on draft and adopted directives (*i.e.* both in the negotiation and transposition phases). Irish requirements are ahead of some other EU countries in this regard. However the guidelines are often not observed. One way of applying pressure on departments to comply is to ensure that RIAs are attached to the drafts sent to the parliament (in the case of draft directives the information may be less developed than for adopted directives).

Recommendation 7.2. Ensure that RIAs related to draft directives and transposition of adopted directives are sent to Parliament.

Communication on EU matters needs attention. The need to identify and prioritise the most important issues for Ireland also puts a premium on communication of the overall strategy. The OECD peer review team heard a number of comments to the effect that the government should communicate more effectively on EU issues (which needs to be put in the perspective of the rejection of two referenda on the EU, and the recent adoption of the Lisbon Treaty). If departments and other key players are to maximise their performance on EU issues, it is important that the government communicates the importance and positive aspects of engagement in EU processes, including transposition of directives, which may be considered as boring.

Recommendation 7.3. Consider how to establish a clearer communications strategy for EU matters, both in strategic terms and at the level of practical detail (for example transposition and infringement rates). Part of this might be picked in the annual BRU report recommended in Chapter 1.

Background

General context

Managing the flow of new EU regulations poses specific challenges for Ireland, which combines a relatively small central administrative system with the small size of the country itself. Departments face resource constraints which gives a prominent role to the permanent representation in Brussels as a place for knowledge and expertise on EU issues. While making communication lines shorter, fostering flexibility and a priority-based approach in negotiations, the resource constraint of departments can limit the capacity of the Irish administration to bring expertise on specific issues and to deal with more complex, cross-cutting issues.

Institutional structures

As in other EU countries, line-ministries take responsibility for EU matters that fall within their remit, but at the same time, a strong central co-ordination and steering function has developed. While changes in the structures put in place on accession had been mainly incremental until the end of the 1990s, the rejection of the Nice Treaty in the referendum of May 2001 triggered significant formalisation in the system for managing EU business. The government formalised inter-departmental co-ordination structures, and the adoption of the

European Union (Scrutiny) Act 2002 enhanced parliamentary scrutiny (Laffan, 2008).² The rejection of the Lisbon Treaty by the voters in June 2008 (eventually adopted in October 2009) prompted another period of review and evaluation at official and political level of how EU issues are managed and communicated at the national level.

The Department of Foreign Affairs shares overall co-ordinating responsibilities on EU issues with the Department of the *Taoiseach*. The Department of Foreign Affairs is responsible for day-to-day co-ordinating on EU matters and ensuring the coherence of Ireland's stance in European institutions. The EU Division of the Department of Foreign Affairs and the Permanent Representation in Brussels interact with EU institutions and Irish government departments both individually and collectively. This includes collecting all formal information from the Commission via the Permanent Representation and dissemination to the relevant bodies in the government and the *Oireachtas*. The Department of the *Taoiseach* has been increasingly involved in EU matters, partly as it provides support to the *Taoiseach* as a member of the European Council. It has a more strategic focus, is involved in all key EU policies and decisions, and can be brought into negotiations in case of specific difficulties or conflict between departments. The involvement of individual departments in EU affairs largely depends on their areas of responsibility. The Department of Finance however plays a prominent role as it is involved in any proposals with financial implications and directly manages EMU, structural funds and taxation issues.

A number of structures are in place to ensure horizontal co-ordination. As for domestic issues, the cabinet is the centre of decision-making. It is complemented by specific EU-related co-ordinating structures (Box 7.1).

Box 7.1. Co-ordinating structures within the executive

- At a political level, the **Cabinet Sub-Committee on EU Affairs** provides strategic overview and direction on major EU developments. It is chaired by the *Taoiseach* and meets regularly. It is attended by key ministers involved in EU matters, ministerial advisers and senior civil servants.
- The **Inter-departmental Co-ordinating Committee on European Affairs (ICCEUA)**, chaired by the Minister of State for European Affairs, is attended by senior officials from all departments (at assistant secretary level) and a representative of the Office of the Attorney General. It focuses on transposition of directives and monitoring of infringement cases against Ireland. It also has an overview of the *Oireachtas* scrutiny procedures.
- The **Senior Officials Group on European Affairs (SOG)** is chaired by the Assistant Secretary General with responsibility for European affairs in the Department of the *Taoiseach*. It plays a complementary role to the ICCEUA in ensuring oversight and co-ordination on EU policy matters. It concentrates primarily on preparation of cross-cutting EU policy issues. It serves as a clearing house and early warning system as well as debriefing officials on the *Taoiseach's* and Minister's key European engagements. It has a significant role in preparing the Cabinet Committee meeting on EU affairs. The group, which meets fortnightly, comprises assistant secretaries from departments with substantial European business and the Permanent Representatives.
- **Other inter-departmental committees are created on an *ad hoc* basis** to deal with specific cross-cutting issues that arise. They are usually attended by senior officials from the relevant departments. A recent example is the Inter-Departmental Committee on Climate Change (non EU specific).

The role of the parliament

The European Union (Scrutiny) Act 2002 set the legislative basis for an enhanced involvement of the parliament in the discussion of EU legislative proposals. The implementation of a more formal scrutiny system was one of the decisions taken after the Nice Treaty referendum was narrowly rejected in May 2001 (and subsequently adopted in October 2002). Under the European Union Act 2002, the government is legally obliged to lay copies of all EU legislative proposals before both houses of the *Oireachtas* together with a statement from the minister outlining the content, purpose and likely implications for Ireland of the proposed measure. The note also indicates the likely means of future transposition (primary or secondary regulation). Under the act, ministers are also obliged to make a report to the Houses of the *Oireachtas* at least twice yearly in relation to EU measures and other EU developments within their area of remit. The objective is to inform the parliament as early as possible in the EU legislative process and give it more capacity to influence the government's negotiation position at the working group level.

The parliament has set up two dedicated joint committees on EU issues, which work in parallel. Generally the Joint Committee on European Affairs deals with issues of policy as well as the transposition and implementation of EU law, while the more recently established Joint Committee on European Scrutiny deals with draft EU legislation before it is adopted at the Council and the European Parliament (Box 7.2).

Box 7.2. Parliamentary Committees for EU affairs

Established in 1995, the **Joint Committee on European Affairs**³ examines EU policies, for example through consideration of green and white papers, and monitors the government's position within the Council of the EU. At the beginning of each year the committee draws up a work programme which sets out the main topics the committee will address during the coming year. It holds a monthly meeting with the Minister of Foreign Affairs or the Minister of State for European Affairs prior to each meeting of the General Affairs and External Relations Council in Brussels.

Established in 2007, the **Joint Committee on European Scrutiny** scrutinises all draft EU proposals sent by departments as required under the 2002 Act. It replaced a sub-committee which the Joint Committee on European Affairs had established to scrutiny EU proposals. It carries out detailed scrutiny of EU legislative measures and reports on the implications of the measures, setting out its conclusions and any recommendations, which are laid before the Houses of the *Oireachtas*. The Joint Committee has its own staff of two policy advisers (it discovered that it was important to have dedicated staff to work on this), and meets at least every two weeks. The committee met 24 times during 2009 to examine the wide range of EU legislative proposals which were published. In all, the committee considered 440 documents of which 391 were new legislative proposals. In 2009, the Joint Committee decided that 24 proposals may be of significant importance to Ireland and required further scrutiny:

- 14 of the proposals were examined in detail by the joint committee itself;
- 5 proposals were sent to the relevant sectoral committee for details scrutiny as provided for in their orders of reference; and
- 5 proposals were sent to the relevant sectoral committee for its observations to assist the European Scrutiny Committee in considering the implications of the proposal.

Source: [www://oireachtas.ie/committees30thdail/j-euscrutiny/work_programme/AR20089-20100513.doc](http://www.oireachtas.ie/committees30thdail/j-euscrutiny/work_programme/AR20089-20100513.doc)

The 2002 Act reinforced the reporting requirements to the parliament. All government ministers have to provide a report to the Joint Committee on European Scrutiny every six

months on measures, proposed measures and other developments in relation to the EU in their remit. The government must provide a report to the parliament on developments in the European Union, which is usually considered by the Joint Committee on European Affairs. In addition, the *Taoiseach* reports to the *Dáil* following every European Council. The *Oireachtas* thus now has systematic information on EU matters, although Ireland does not go so far as a few other EU countries, where parliament gives a mandate to the government for negotiation.

The European Union Act 2009 provides for some new powers for the *Oireachtas* under the terms of the Lisbon Treaty, particularly in respect of national parliaments' new role to ensure that the principle of subsidiarity is respected. More broadly the rejection of the Lisbon Treaty by the voters in June 2008 led the Joint Committee on European Affairs to set up a sub-committee charged with assessing Ireland's management of EU issues. One of the key recommendations of its report of November 2008 was to enhance the role of the *Oireachtas* and address weaknesses in the way the *Oireachtas* can hold the government to account for its role in EU law making. This includes earlier involvement in the EU law making process, increased transparency regarding the use of statutory instruments for transposing EU directives, and better use of RIA.⁴

A subsequent review on the role of the *Oireachtas* in European Affairs was carried out by a joint sub-Committee of the JCEA and JCES, which reported in July 2010. While many of the recommendations are about the organisation of business within the *Oireachtas* including amalgamation of the two Committees into one Joint Committee, other recommendations covered a number of other issues including – The introduction of a scrutiny reserve system; Ministers to appear before Committees before Councils; European Council Statements to take place before the EC; On the issue of transposition, Committees to have a role in decision on primary or secondary legislation route; On the issue of infringements/transposition, interaction between ICCEUA and European Committees; JCEA should undertake comparative analysis of transposition of selected number of EU Directives (re goldplating). The report's recommendations will be considered by Government and it is expected will be debated in the *Oireachtas* in Autumn 2010.⁵

Negotiating EU regulations

Institutional framework and processes

Overall responsibility for negotiation of a proposed EU regulation is normally assumed by the department whose officials service the Council working group at which the proposal is presented. The process is not systematic as each department is left to define its standard procedures for preparing negotiations, reporting on them and sharing information with other departments. The need for departments to provide the *Oireachtas* with notes on EU proposals and to prepare RIAs (see below) has however forced each department to put in place procedures. The preparatory work for negotiations is conducted by home-based officials in close conjunction with Brussels-based officials. The Permanent Representation in Brussels, whose staff includes attaches from each government department, plays a key role in detailed co-ordination on the spot with all departments involved, as negotiations proceed. Given resource constraints, the capacity to act at an early stage of the process depends in practice on the resources and priority assigned to the issue.

If a proposal affects some issues which are outside the remit of the department servicing the relevant working group, that department has a responsibility to seek views of other relevant departments. Where there is disagreement on lead responsibility, the

Department of Foreign Affairs provides guidance and acts an informal mediator between the departments concerned. A government decision of 10 December 2002 established the procedures for resolution of disputes about which department is responsible for an EU measure in the context of the European Union (Scrutiny) Act 2002, which can lead the Secretary-General to the government (in the Department of the *Taoiseach*) in consultation with the *Taoiseach* to make a binding determination.⁶ In practice, this procedure has rarely proved necessary.⁷

Ex ante impact assessment (negotiation stage)

Departments are in principle required to conduct RIAs on all proposed EU Directives and on significant EU regulations. The revised RIA guidelines indicate that “the RIA process should be commenced as early as possible and certainly no later than four weeks from when the Commission publishes the proposed legislation and its own impact assessment. (...) The RIA should contain a sufficient level of analysis of key issues to properly inform Ireland’s negotiating position, thereby minimising any potentially negative implications for Ireland”.⁸ The guidelines encourage officials to update the RIA periodically to take account of significant changes introduced at various stage of the proposal’s development. Guidelines provide detailed explanations as well as practical examples. However the guidelines are rarely observed in practice. The RIA review conducted in 2008 showed that departments carried out few RIAs in relation to draft EU legislation. The OECD interviews did not show tangible sign of progress in that respect, and revealed doubts among officials as to the relevance of the exercise.

Transposing EU regulations

Institutional framework and processes

The department in charge of negotiation is also responsible for the transposition of the directive. Where the content of a proposed directive cuts across the remit of a number of government departments, those departments involved agree upon a lead department. In cases where proposals remain unallocated the Department of Foreign Affairs facilitates the allocation of the directive to a department through dialogue with the key stakeholders. In case of a dispute over responsibility the same procedure as the one regarding negotiation can be applied. Likewise it is rarely needed. The Department of Foreign Affairs is also the central point for managing infringement procedures supported by the monitoring role of the ICCEUA chaired by the Minister of State for European Affairs.

EU directives can be transposed into Irish law either through primary domestic legislation, or through ministerial regulations (statutory instruments). The usual route is statutory instruments. There is no detailed statistical analysis on the relative use of acts or statutory instruments to transpose EU directives. The tendency is to copy out directives into Irish law, that is, to replicate as far as possible the wording of the directive into Irish legislation, a practice which can be found in some but not all other EU countries (some such as the United Kingdom seeking to rewrite directives so that they fit more closely with English law).

The Department of the *Taoiseach* published “Guidelines on best practice on Transposition of EU Directives”⁹ in March 2006. The guidelines are based on EU Commission recommendations; fully integrate the principles of Better Regulation and the Regulatory Impact Analysis model (but are not integrated into the RIA guidelines); take into account the increasing influence of the courts and the evolving case law on the transposition process; take into account the *Oireachtas* Scrutiny Process and provide early

warning to government of EU legislation likely to be difficult and/or costly to transpose; and set out in simple steps how best to transpose a Directive.

As for domestic laws, bills transposing EU regulations are drafted by a team of specialist lawyers at the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of primary legislation. Although Departments when requesting drafting by the Office of the Parliamentary Counsel are obliged to provide a table of correspondence/equivalence whereby each Article of the new Directive is listed against proposed or existing domestic legislative measure, it may often be the case that, for whatever reason (usually resource related), such a table is not forwarded to the Office of the Parliamentary Counsel.

Legal provisions and the role of the parliament

The Joint Committee on European Affairs has responsibility on behalf of the *Oireachtas* for overseeing transposition and implementation of EU regulations. Sectoral committees can look at relevant directives and the Joint *Oireachtas* Committee on European Scrutiny can also refer particular directives to the relevant committee. Efforts have in the past tended to focus more on fostering parliament's involvement at the early stage of EU law development, to give parliament an opportunity to influence the process and hold ministers accountable. The Sub-Committee on Ireland's Future in the European Union has, however, outlined the need for enhanced accountability in transposition and oversight of statutory instruments.¹⁰ It has recommended that heads of the instruments be circulated to *Oireachtas* members to mirror the current practice of distributing all texts of draft primary legislation. The subsequent report of the Joint Sub-committee on the role of the *Oireachtas* in European Affairs made similar recommendations.¹¹

Ex ante impact assessment (transposition stage)

The RIA Guidelines indicate that officials responsible for the transposition of EU Directives should prepare a separate RIA on the available transposition options (both legislative and non-legislative). They should also distinguish prescriptive or mandatory elements and elements that are optional or have been added as a result of specific national concerns, as a means to detect any goldplating. The RIA is to draw on the RIA done at the stage of EU proposal development. The guidelines also indicate that the RIA should be published as early as possible, and not later than publication of the statutory instrument or bill. Implementation is challenging, as for RIA in general (Chapter 4) and according to the Irish government, is aggravated by the difficulty of interacting with the EU-level RIA. RIAs on transposition texts to transpose EU directives are more commonly seen than on draft EU texts for negotiation.

Monitoring transposition

The Inter-Departmental Co-ordinating Committee on EU Affairs (ICCEUA) has a central monitoring and oversight role regarding the timely transposition of EU legislation into Irish law. The committee has a particular focus on Ireland's performance in transposing EU Directives in time, which is a standing agenda item of its meetings. The committee also reviews infringement proceedings brought against Ireland at each meeting. Other items include issues arising at key working groups in the EU and information exchange between government departments on EU issues.

A major recent change has been the introduction of *EUReturns* in September 2007, an electronic database, to co-ordinate and monitor information. The system tracks information

on the transposition of all EU directives (both internal market and non-internal market directives) and records information on any infringement proceedings. Adopted directives are added to the system, upon request of departments responsible for the directive or after checking the European Commission's databases. Departments fill in the fields on directives for which they have responsibility. The EU Affairs Division in the Department of the *Taoiseach* manages the *EUReturns* system.

The *EUReturns* system produces a number of reports which provide snapshots of Ireland's performance in real-time. Each department can run reports on directives and infringements under their remit while the Department of the *Taoiseach*, the Department of Foreign Affairs and the Office of the Attorney General can run reports for the whole of government. The system is now running as routine, with the departments filling in the information on a regular basis. The reports, which form the basis of the discussion on transposition and infringement proceedings at the monthly ICCEUA meetings, have proved a useful tool for central government to monitor Ireland's performance. The EU Affairs Division now focuses its efforts on encouraging departments to make their own more pro active use of the system.

There is no central policy requiring departments to prepare correlation tables as part of the transposition of EU Directives into Irish law. A number of departments produce correlation tables for their own internal use; however, no department publishes correlation tables. The European Commission is developing a pilot project on correlation tables, in which Ireland has signalled it would be willing to participate.

As regards goldplating (going beyond what is strictly necessary to transpose a directive), which is an issue in a number of EU countries, the OECD peer review team did not pick up any strong issues. Parliament relayed some concerns from its hearings about "the regular use of secondary legislation to give effect to far reaching proposals" and the "perception that Ireland implements or enforces its EU obligations more rigorously than some other member states".

Box 7.3. Ireland's performance in the transposition of EU directives

The European Commission's Internal Market Scoreboard* gives a snapshot of Member States' progress on the transposition into national law of EU Directives. The July 2009 scoreboard shows that Ireland achieved its best ever score with a transposition deficit ratio of 0.8%. This score means that Ireland has achieved the European Commission target of a 1% transposition deficit ratio consistently for the last three Internal Market Scoreboards and ahead of the 2009 deadline set out by the European Commission.

The scorecard indicates that Ireland has 31 cases of non-fully transposed directives (18 correctly transposed, 13 not fully transposed) against 13 outstanding directives, which roughly puts it in the middle of the league) and 16 Member States have the same or more cases of non-conformity than outstanding directives. Ireland has 63 pending infringement cases, a vast majority of which due to incorrectly transposed or not properly applied directives. It is one of three member states, within the EU-15, that have seen an increase in the number of infringement procedures against them as compared to May 2006.

Source: European Communities (2009), Internal Market Scorecard, July 2009. Available at: http://ec.europa.eu/internal_market/score/docs/score19_en.pdf (accessed February 17, 2009).

Table 7.1. Ireland’s performance in the transposition of EU Directives

	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02	Nov-02
Transposition deficit as % in terms of Internal Market Directives	5.4	5.4	5.8	3.9	4.4	4.0	3.6	3.3	2.4	2.4	2.6
	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08	July-09	Nov-09
	3.5	1.2	1.6	1.8	2.0	1.2	1.7	1.2	1.0	0.8	1.0

Source: European Commission.

Interface with Better Regulation policies at EU level

Ireland makes considerable efforts within the limits of its capacities as a small country, to attend relevant meetings at EU level, including participation in the EU HLG, SPOC group and SCM network. Under its 2004 Presidency, Ireland was very active in helping to shape and drive the EU Better Regulation agenda, then at its beginnings. It followed this up by chairing a group which led to the development of a training course for the EU level impact assessments.

The revision of the EU elements of the RIA guidelines highlighted some difficulties met by Irish officials with impact assessments produced by the European Commission. A key issue is the fact that the impact assessments (IAs) produced in advance of the publication of draft legislation are not subsequently updated. This means that the information set out in the impact assessment can bear little relationship to evolving proposals to which national officials are expected to apply RIA. In addition, resource constraints make it difficult for Ireland as a small member state to participate in all expert groups and influence the content of the impact assessment and to supply alternative data. Irish officials emphasised the importance of quality RIAs at EU level.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Brigid Laffan and Jane O’Mahony (2008), *Ireland and the European Union*, Palgrave Macmillan.
3. Established in 1995, the Joint Committee on European Affairs took over the responsibilities of the *Oireachtas* Joint Committee on Secondary Legislation that had been set up in 1973 when Ireland joined the EEC. The role of the Joint Committee on Secondary Legislation was to oversee the secondary legislation used to bring EU law into effect in Ireland. The role of the Joint Committee on European Affairs was extended to monitor both EU policies and legislation emerging from the European Union.

4. Houses of the Oireachtas. Sub-Committee on Ireland's Future in the European Union. "Ireland's future in the European Union: Challenges, Issues and Options", November 2008. <http://www.euaffairs.ie/publications/Final-version-Sub-Comm-Report-full.pdf>, accessed February 16, 2010.
5. Source: www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm.
6. The decision provides that the Department of Foreign Affairs, assisted where necessary by the European Affairs Division, Department of the Taoiseach, will make an initial ruling on which department is responsible. If a Department feels that the ruling is incorrect, the Secretary General of that Department can indicate in writing to the Secretary General to the Government the reasons why the Department identified should not have responsibility for the measure, and the reasons why another department should. The Secretary General to the Government, in consultation with the Taoiseach, makes a finding which will be binding on departments.
7. The Irish government says that it is only aware of one case since 2007 that required formal adjudication. In this case, when departments could not agree on lead responsibility, the Department of Foreign Affairs had to meet with them, receive written submissions and make a ruling. Where there have been disagreements between departments, the Department of Foreign Affairs mediates and this has always brought a mutual solution, other than in the one case referred to above. It should be emphasised that the number of such cases are really low, probably 1-2% and are generally settled amicably.
8. Department of the *Taoiseach*. "Revised RIA Guidelines – How to Conduct a Regulatory Impact Analysis", June 2009.
9. The guidelines are available at: www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Final_Version_Guidelines.pdf.
10. Page 74 of the report.
11. Source: www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EuropeanAffairs/SubCtteeRoleofOireachtas/Publications/document1.htm.



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