

WHISTLEBLOWER'S REGULATION – LEGAL AND ETHICAL PERSPECTIVES ON EU DIRECTIVE TRANSPOSITION INTO NATIONAL LAW

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ABSTRACT. This article is analysing the legal perspective on whistleblowing, at European and national level, focusing on the scientific studies' results and theories, emphasizing nuances which worth discussing in order to a better understanding of the social phenomenon and of individual psychological decision process for reporting a wrongdoing or the suspicion of a possible breach. We are also arguing that current whistleblower regulations must take into account both the European directive and recent research in this field, pointing out some question which are raising from the lack of the ethical and cultural focused research of Romanian society perspective on whistleblowing, considering also the recent past experiences of Romanians with 'political police' actions in years of communism. We are establishing a few research direction which we conclude that could bring the knowledge to drawing a more relevant and applicable whistleblowing law.

Keywords: whistleblower, EU directive, Romanian law, whistleblower protection, normative conduct theories.

The discussion on whistleblowing regulation, the meaning of this legal concept within an organization and the individual consequences of this type of reporting begins with establishing the roots of this concept and its significance related to human rights.

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Whistleblowing has been described as a “human right and a freedom fundamental to democracy”². As we look at art. 19 of Universal Declaration of Human Rights³ we notice that the right of opinion and expression is accompanied by the right to receive and share information. Guarantees of constitutional protection of this right are to be found in Romanian Constitution, as well. Art. 31 of Romanian Constitution⁴ protects the right to have access to any information of public interest, public authorities having the obligation to provide any information of public interest to any interested citizen. As we will go further with our analysis, we will look at the complex and subtle mechanisms settled for protecting this right and for creating the context in which it can be valued. The process of developing this framework has mainly an ethical background and a legislative result – a law which set in place provisions which makes possible revealing the truth without suffering harm. We will look at the struggles which led to the current form of the whistleblower’s Romanian law emphasizing the ethical and moral arguments used by all the factors who expressed their view on the law provisions with the scope to protect de whistleblower. We cannot ignore also the arguments of those who tried to diminish the role of this integrity reporting by limiting the channels by which the report can be transmitted or by keeping the protection mechanisms of the whistleblower in more formal boundaries which have no chance of really accomplishing their objective.

At least the definition of whistleblower was widely agreed upon, from a legal perspective, since it is defined by the EU Directive⁵, being the ‘reporting person’- “a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities”⁶, a person “working in the private or public sector who acquired information on breaches in a work-related context”⁷. Still, there are nuances which worth discussing in order to a better understanding of the social phenomenon and of individual psychological decision process for reporting a wrongdoing or the suspicion of a possible breach. In that regard, there is an important element – disclosure, “ringing the bell” – in the reporting of the

² Vandekerckhove, Wim, *Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection*, Journal of Business Ethics (2022) 179: 1–11, p.1, <https://doi.org/10.1007/s10551-021-04771-x>.

³ Ratified by United Nations General Assembly Resolution 217A adopted on December 10, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁴ Art.31, Romanian Constitution, <https://www.constitutia.ro/>.

⁵ Directive (EU) 2019/1937 of The European Parliament and of The Council of 23 October 2019 on the protection of persons who report breaches of Union law, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>.

⁶ Article 5, paragraph 7, *ibidem*.

⁷ Article 4, paragraph 1, *ibidem*.

insider who has access to that information on the bases of his duty, disclosure being “typically voluntary and initiated by the observer of the perceived wrongdoing”⁸. Another important element in understanding whistleblowing is the characteristic of the wrongdoing they are reporting: the breach has to occur within an organizational context (either the wrongdoing is perceived to be under the control of an organization, or the organization itself is a victim of an individual’s action)⁹.

Even if the whistleblowing regulation was recently adopted by the European Union, the concept had been used from the late 1960s and it began to be analysed beginning with the publication of two materials in 1972: *Whistle Blowing: The Report of the Conference on Professional Responsibility*, 1 edited by Ralph Nader, Peter J. Petkas, and Kate Blackwell, and *Blowing the Whistle*, by Charles Peters and Taylor Branch¹⁰. Whistleblowing is considered a latecomer in the context of other practices as watchdog journalism and political activism, but holding a “unique place in ethics and democracy”¹¹.

Before discussing the legal perspective on whistleblowing, on European and national level, we are going to focus on the scientific studies’ results and theories which should have been taken into consideration in the process of drawing the law, since the whistleblowing process is mainly an individual psychological process of taking the decision based on the normative system of beliefs.

The classical model for explaining whistleblowing, presented by Henik (2015)¹² is describing five stages: first, an event is being perceived as a trigger, secondly, a person evaluates the event as non-congruent with the norms and decides to act; on the third stage, the observer takes action and reports the event, the fourth stage consists in the organization reaction to the report, then, in the fifth stage, the whistleblower goes further or not with the report, depending on evaluation of the organization reaction. There are recent research¹³ which are suggesting the extension of Henik’s model by introducing one more stage between the trigger and the decision to perform the action, an additional stage in which we are focusing on the

⁸ A J Brown, D Lewis, R Moberly, W Vandekerckhove, *International Handbook on Whistleblowing Research*, Edward Elgar Publishing, 2014, p.75, DOI:10.4337/9781781006795.

⁹ Ibidem, p.76-77.

¹⁰ Apud. Olesen, Thomas, *The Birth of an Action Repertoire: On the Origins of the Concept of Whistleblowing*, *Journal of Business Ethics* (2022) 179:13–24, p.13, <https://doi.org/10.1007/s10551-021-04868-3>.

¹¹ Ibidem, p.1.

¹² apud. Rosângela Mesquita Ayres Fernanda Filgueiras Sauerbronn, Ana Carolina Pimentel Duarte da Fonseca, *Accounting professionals and whistleblowing: a typology of the influence of institutional logics*, *Revista Contabilidade & Finanças* 33(3), 2022, DOI: 10.1590/1808-057x202112830.

¹³ Ibidem, p.252.

observer's intention to act, a process which reflects the interaction of different type of norms (ethical and legal, societal, organizational or individual). The importance of this stage is reflected by the possibility to stop the entire process at this level, based on a complex evaluation of the norms and also of the consequences of engaging in whistleblowing. The understanding of the decision process of reporting the wrongdoings could allow the legislators to develop legal mechanisms that increase the potential for whistleblowing.

The focus theory of normative conduct represents the classical theory which analyse the way in which norms influence the behaviour in social context. It is widely accepted that norms have an enormous impact on behaviour, but the nuances of this process, the differences between types of norms and their impact on various types of behaviour, mediated by individual axiological system, has not been thoroughly and scientifically discussed until Cialdini's work¹⁴. Cialdini makes a distinction between descriptive norms and injunctive norms and analyses the impact of the norm on behaviour based on this criteria. This classification is also used in science of law which distinguish between dispositive norms and imperative norms. Basically, Cialdini explains descriptive norms, as the ones that specify what is done and injunctive norms as the ones that specify what should be done. Injunctive norms are a part of group's moral guidelines, encouraging action by promising social rewards as well as sanctions - meaning the individual perception of how most others would approve or disapprove of one's behaviour. Cialdini introduces also the personal norms, by which a person is guiding his behaviour, depending of the approval of the others. His studies conclude that "finally, at a given time, an individual's actions are likely to conform to the dictates of the type of norm that is currently focal, even when the other types of norms dictate contrary conduct"¹⁵. Furthermore, the studies show that the more effective strategy for maximizing a socially desirable behaviour in numerous situation in which such desirable conduct is not the widespread, is to activate injunctive norms.

For instance, a relevant illustrative situation of the study conclusion is that of designing a campaign reducing excessive speeds:

¹⁴ Robert B. Cialdini Carl A. Kallgren Raymond R. Reno, *A Focus Theory of Normative Conduct: a Theoretical Refinement and Reevaluation of The Role of Norms in Human Behavior*, Advances in Experimental, 1991, Academic Press, Inc. Social Psychology, Vol 24, p.202;
<http://www.influenceatwork.com/wp-content/uploads/2015/05/A-Focus-Theory-of-Normative-Conduct.pdf>.

¹⁵ Ibidem, p.203.

... a billboard campaign designed to reduce excessive highway speeds by (1) creating a descriptive norm focus in passing motorists should be successful only on those stretches of road where speeding was not typically a problem; (2) creating a personal norm focus should be successful only among those passing motorists who don't prefer to exceed the speed limit; (3) focusing motorists on social disapproval of speeders should be successful across a wide variety of settings and drivers.¹⁶

Before going further with recent studies on the mechanisms of whistleblowing, we have to emphasize that Romanian legislation was in line with this findings, at list in some extend regarding the whistleblower regulation even before the EU legislation transposition specifically on this matter.

Even before the approval of the new Criminal Code, there were provisions within the law regarding "Omission of reporting", now article 267 Criminal Code, Special Part, Chapter 4, Offenses against the administration of justice:

1) The civil servant who, becoming aware of the commission of an act sanctioned by the criminal law in relation to the service in which he performs his duties, omits to notify the criminal investigation bodies immediately, shall be punished with imprisonment from 3 months to 3 years or with a fine.

(2) When the act is committed out of fault, the penalty is imprisonment from 3 months to one year or a fine.¹⁷

So, the whistleblowing, as we defined the concept - reporting or publicly disclosing information on breaches acknowledged by a person in the context of his work-related activities, becomes in this case an obligation, being enforced by a severe punishment within an injunctive norm. Two aspects have to be taken into consideration in this situation: first, the wrongdoing the whistleblower had noticed have to be sanctioned by the criminal code, so it has to be a criminal offence, which is a very serious antisocial behaviour; secondly, the duty of reporting is the responsibility of "civil servant" as defined by the Criminal Code, which is a much broader concept then we usually understand in administrative law perspective. So, in article 175, Criminal Code, in the criminal law perspective, the civil servant is the person who, permanent or temporary, with or without compensation:

¹⁶ Ibidem.

¹⁷ Article 276, Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, published in "Monitorul Oficial nr. 510 din 24 iulie 2009" (Official Gazette no. 510 of July 24, 2009).

- a) exercise duties and responsibilities, established under the law, in order to realize the prerogatives of the legislative, executive or judicial power;
- b) exercise a position of public dignity or a public position of any nature;
- c) exercises, alone or together with other persons, within an autonomous government, another economic operator or a legal person with full or majority state capital or a legal person declared to be of public utility, attributions related to the achievement of the object of its activity.

(2) Likewise, a public servant, within the meaning of the criminal law, is considered a person who performs a service of public interest for which he was vested by the public authorities or who is subject to their control or supervision regarding the performance of that public service.¹⁸

Based on this broad definition, we can say that the public area was already covered by an injunctive norm regarding whistleblowing a criminal offence committed by a person who works with or without remuneration in authorities of legislative, executive or judicial power. Nonetheless, there were no provisions regarding internal reporting procedures or mechanisms for whistleblower protection and other wrongdoing that does not qualify as a criminal offense mentioned in this context.

Furthermore, current whistleblower regulations must take into account both the European directive and recent research in this field.

Some studies have focused on the importance of organizational support for whistleblowers in preventing or minimizing employee perceptions of mistreatment¹⁹. The studies show that the primary goal of most support strategies is to build a network of people around the whistleblower who have the authority, skills, and capacities needed to mitigate the risk of the individual suffering personal or professional harm²⁰. This role can be performed by retired former organisation executives, external professionals, counselors, and career development officers.

Another study examines the relationship between the frequency of unethical behavior observed by employees in their organization and their intention to whistleblow, based on the Focus Theory of Normative Conduct. Employee beliefs

¹⁸ Article 175, *ibidem*.

¹⁹ Peter Roberts, A. J. Brown, Jane Olsen, *Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations*, Australia and New Zealand School of Government (ANZSOG), ANU Press, 2011, p.75, <https://www.jstor.org/stable/j.ctt24hcvb>.

²⁰ *Ibidem*, p.82.

about how supportive their management is when dealing with whistleblowing reports moderate the relationship between the frequency of unethical behavior observed by employees and their intention to whistleblow²¹. Study results show that the greater the frequency of observed unethical behaviour, the more probable professionals will assume that unethical behaviour is normal and that reporting unethical behaviour is abnormal (because one only blows the whistle on behaviour that is supposed to be not normal or not accepted). This reduces the likelihood that employees would therefore form the actual intent to whistleblow internally when encounter of unethical conduct.

The conclusion of this research states that “the more frequently employees observe unethical behaviour, the less they have the intention to whistleblow internally and the more they have the intention to whistleblow externally”²².

So, it means that in drawing regulation in order to encourage and protect whistleblowing we have to set in place more functional external mechanisms which will work no matter how frequent is the wrongdoing within the organization. This idea emerged also from the comments of civil society on the whistleblowing law draft presented by Romanian authorities for public consultation, to which we will refer later.

Another interesting finding was described as a result of studying the relation between the leader's emotional intelligence and the subordinate's whistleblowing intentions, with the hypothesis that if the leader is part of the fraud, being the one who is going to be reported, the level of leader's emotional intelligence influences the employee intention to whistleblow his wrongdoing. Even if an anonymous reporting channel is accessible, the subordinate is less likely to report the situation when the leader has high emotional intelligence²³. On the opposite side, a high level of employees emotional intelligence has been demonstrated to actually improve whistleblowing intentions. This findings raise a question about the positive and also negative consequences of emotional intelligence in the evaluation for a managerial position. Nevertheless, the research also discovered that when the outcomes of whistleblowing have been framed as being valuable to the firm, the subordinate

²¹ Muel Kaptein, *How Much You See Is How You Respond: The Curvilinear Relationship Between the Frequency of Observed Unethical Behavior and The Whistleblowing Intention*, *Journal of Business Ethics* (2022) 175:857–875, p. 857, <https://doi.org/10.1007/s10551-020-04663-6>.

²² *Ibidem*.

²³ Xin Geng; A. Scott Fleming, *Should I Blow the Whistle on My Boss? An Investigation of the Effects of Emotional Intelligence and Consequence Framing on the Subordinates' Whistleblowing Intentions*, *Journal of Forensic Accounting Research* (2021) 6 (1): 291–312, p.307, <https://doi.org/10.2308/JFAR-2019-508>.

seems to be more likely to whistleblow, even when the leader has high level of emotional intelligence²⁴.

As for the whistleblowing channels preferred for reporting a wrongdoing, a recent empirical study²⁵ shows that online channels are the most preferred ones, mostly the social media platforms (Facebook, Twitter etc.).

Having so many significant scientific research results on whistleblowing, one could say that drawing a good law on this matter would be a very well documented and quite facile process. The stage of the transposition within the EU member states of “EU Directive on Whistleblowing” argues the contrary: only 78% from 27 EU states which had to transpose the EU Directive on whistleblowing until 17th December 2021 are in the process of doing that at the present moment, November 2022, and 22% have not even started this process, based on EU whistleblowing meter dates²⁶. We can agree, even from this raw statistics, that whistleblowing has different approaches depending not only of political view, but also from cultural perspective of various countries and regions of the world. This assumption is supported by cross-cultural research. Besides that, the term “whistleblowing” can have different connotations in various languages around the world and “research on whistleblowing requires different methods and research design in each country and society”²⁷. Previous research also sustained that the whistleblowing mechanisms had to be compatible and adapted to cultural values and proved the differences between cultures: “the results suggest that compared to Indian and Chinese cultures, whistle-blowing as an internal control mechanism is likely to be more effective in Australian culture”²⁸.

We have no scientific evidence, at this point, of the values and specific characteristics of whistleblowing within our country, fact that can be a valuable and promising line for research, given the history and the experience of Romanians with the practice of political police during communist years, which may had have

²⁴ Ibidem.

²⁵ Hengky Latan, Charbel Jose Chiappetta Jabbour, Ana Beatriz Lopes de Sousa Jabbour, *Social Media as a Form of Virtual Whistleblowing: Empirical Evidence for Elements of the Diamond Model*, Journal of Business Ethics (2021) 174:529–548, p.544, <https://doi.org/10.1007/s10551-020-04598-y>.

²⁶ <https://www.polimeter.org/en/euwhistleblowing>, accessed at 02.10.2022.

²⁷ Vandekerckhove, W., Uys, T., Rehg, M. T., & Brown, A. J. (2014). *Understandings of whistleblowing: dilemmas of societal culture*. In A. J. Brown, D. Lewis, R. Moberly, & W. Vandekerckhove (Eds.), *International handbook of whistleblowing research* (pp. 37–70). Cheltenham: Edward Elgar, *apud*. Hengky Latan, Charbel Jose Chiappetta Jabbour, Ana Beatriz Lopes de Sousa Jabbour, *idem*.

²⁸ Chris Patel, *Some Cross-Cultural Evidence on Whistle-Blowing as an Internal Control Mechanism*, Journal of International Accounting Research (2003) 2 (1): 69–96, p.69, <https://doi.org/10.2308/jiar.2003.2.1.69>.

significantly modified our perception on whistleblowing and its social value. That is possibly the reason why the transposition of “EU Directive on Whistleblowing” in Romanian legislation triggered intense public reactions, some of which focused on whistleblower protection mechanisms, while others questioned the principle of whistleblowing based on political communist police Romanian experience.

The discussions emerged from the expanding of the law's area of application from the public institution to other organizations, considering that in Romanian legislation there was already a whistleblowing law adopted in 2004²⁹. This law was designed to regulate measures to protect individuals who expose or report law violations within public authorities. The mentioned law includes internal or external channels of disclosure which can be used separately or in combination, including the person's hierarchical superior, public authority manager, the discipline committees or other similar bodies within the public authorities, judicial officers, the organizations in charge of identifying and investigating potential conflicts of interest and incompatibilities, mass media, professionals, nongovernmental organizations or different employers' associations³⁰. Whistleblower protection measures include banning of disciplinary measures sanctioning the employee for submitting a report created in good faith, identity protection or the whistleblower, but only in some cases notifications, enhanced publicity of the disciplinary hearing for a whistleblower, if this measure is taken. The law does not regulate the whistleblowing within private organizations and do not provide efficient and relevant protection mechanisms of whistleblower in case of repercussions. This area is included in the provisions of EU Directive on Whistleblowing.

“EU Directive on Whistleblowing” covers the following aspects, drawing specific provision for the EU states to transpose in national legislation: the description of essential concepts and of directive scope, reporting person protection requirements, duty to establish internal reporting channels, guidelines for internal reporting, responsibility to establish external reporting channels and follow up on reports, development of external reporting channels, data related the receipt of reports and their follow-up, review of methodologies by competent authorities, public disclosures, obligation of nondisclosure, personal data processing, records management. The most relevant provisions for encouragement of wrongdoing reporting are those regarding whistleblowers' protection measures.

²⁹ Law no. 571/2004 regarding the protection of personnel from public authorities, public institutions and other units that report violations of the law, published in “Monitorul Oficial nr. 1214/17 decembrie 2004” (Official Gazette no. 1214 of 17th December, 2004).

³⁰ Article 6, *ibidem*.

The government draw a project of the law regarding the protection of whistleblowers in the public interest³¹ which is transposing the regulation of EU Directive on whistleblowing, based on a "Correlation Table with European Directives"³².

The draft law went through the entire legislative procedure on Parliament, undergoing several changes that altered its compliance with the European directive's provisions. Interestingly enough, the project was modified on the same issues the civil society raised concerns when the draft was presented for public consultation:

...in the current form of the transposition bill, a whistleblower who does not report internally might have reservations about reporting externally or publicly disclosing violations of the law, fearing that he will be sanctioned precisely because he would not have chosen the internal channel, although he had clear reasons for doing so (*Transparency Internațional Romania*)³³.

... very often when the topic of discussion is whistleblowing in the public interest, the first topic that comes up in the conversation is how to avoid illegitimate or false reporting by whistleblowers, the so-called abuse of whistleblower rights. This is not a problem for Romania, nor has it been a problem for the last 30 years. What really exists is the problem of abuse of power and corruption, and there is a fear of reporting violations of the law³⁴.

...another unsubstantiated issue frequently raised: that whistleblowers are aware of these violations of the law in a professional context. We must make a distinction between the so-called "political police" and the institution of "public interest warning" which is a European institution. Whistleblowers do not report co-workers' private lives, who is dating whom, what radio they listen to, or what the co-worker's political views are (*Syrene Centre for Education*)³⁵.

³¹Law project no 219/2002 regarding the protection of whistleblowers in the public interest, http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19995.

³² <http://www.cdep.ro/proiecte/2022/200/10/9/conc269.pdf>.

³³ Public debate summary on the project of project of the law regarding the protection of whistleblowers in the public interest, <https://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public/>.

³⁴ Ibidem.

³⁵ Ibidem.

We should have guarantees in place to protect whistleblowers with integrity. There have been cases where dismissal has taken the form of job termination³⁶. (*Centre for Advanced Research in Management and Applied Ethics*)

... the importance of regulating anonymous reporting and the importance of traceability to allow whistleblowers to track the progress of their investigations³⁷ (*Ernst&Young*).

Even if these concerns were raised by civil society representatives before the discussion of the draft within the parliament chambers, there were still changes made to the project which ignored the flags raised by civil society. So, the law was sent to the state president for promulgation. Based on his constitutional prerogatives, the state president resent the project of the law adopted by the Parliament to this legislative body for the re-examination. The president's arguments are more or less similar to those the issues civil society insisted on during public consultation process: clear provisions within the law for investigating also the anonymous reports, extension of the reports' keeping period from two to five years in order for the reports to have the chance to be properly investigated, maintaining the principle of presumed good faith of the whistleblower, public procedures on institutions web pages for informing the citizens regarding the mechanisms of whistleblower protection etc.

The draft law on the protection of whistleblowers was sent to the Parliament for re-examination by the president of the state, and the Senate adopted it for the second time with some changes to ensure compliance with the president's remarks. The document will be sent back to the deputies for a final vote, and they must ensure that they vote for a bill that ensures the best possible transposition of the European Whistleblower Directive, with which we are already behind schedule. The Whistleblower Law will essentially provide increased protection for whistleblowers while also imposing obligations on companies and other employers.

Conclusions

Based on reviewed research results, our analysis of recent studies, legal provisions and legislative procedure of whistleblowing law draft we can conclude

³⁶ Ibidem.

³⁷ Ibidem.

that, even if the whistleblowing Romanian regulation is transposing formally the EU Directive on the matter- on the hypothesis that the president's and civil society observation will be included within the law during the re-examination process, the actual implementation of the law will not adequately serve the scope of the law.

First, there are no researches on the cultural specificity of this theme- whistleblowing- in Romanian society normative perspective, even if the studies showed that whistleblowing is cultural mediated³⁸. This research is necessary even more in Romania than in other countries, keeping in mind the Romanian experience of the 'political police' actions in our recent past.

Secondly, there are no studies on how effective the injunctive norm on whistleblowing within Criminal Code is: how many civil servants reported criminal offences because of that norm and how many were investigated for not disclosing the wrongdoing. How effective was the descriptive norm in Romanian legislation: how many whistleblowers reported irregularities within the public institution they worked in and how efficient the protection mechanisms were, considering the fact that Romania had a whistleblowing law beginning with 2004. Also, we did not identify any Romanian study regarding the perception of whistleblowing in contemporary Romanian society, given the fact that researches showed that when the outcomes of whistleblowing have been framed as being valuable to the firm (society *a.n*), the people seem to be more likely to whistleblow³⁹.

So, all these arguments are raising the question: is this new regulation going to really work? We think that we need to answer all previous question through scientific research before having a real chance to determine changes in Romanian society by drawing a whistleblowing law, even if this is transposing the EU Directive provisions. After all, as Mark MacGann, Uber whistleblower, said in his speech before the European Parliament: "democracy is about protecting the powerless from the powerful"⁴⁰, especially when the powerful are also those drawing the law, we might conclude.

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⁴⁰ https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-employment-and-social-affairs_20221025-1000-COMMITTEE-EMPL.

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