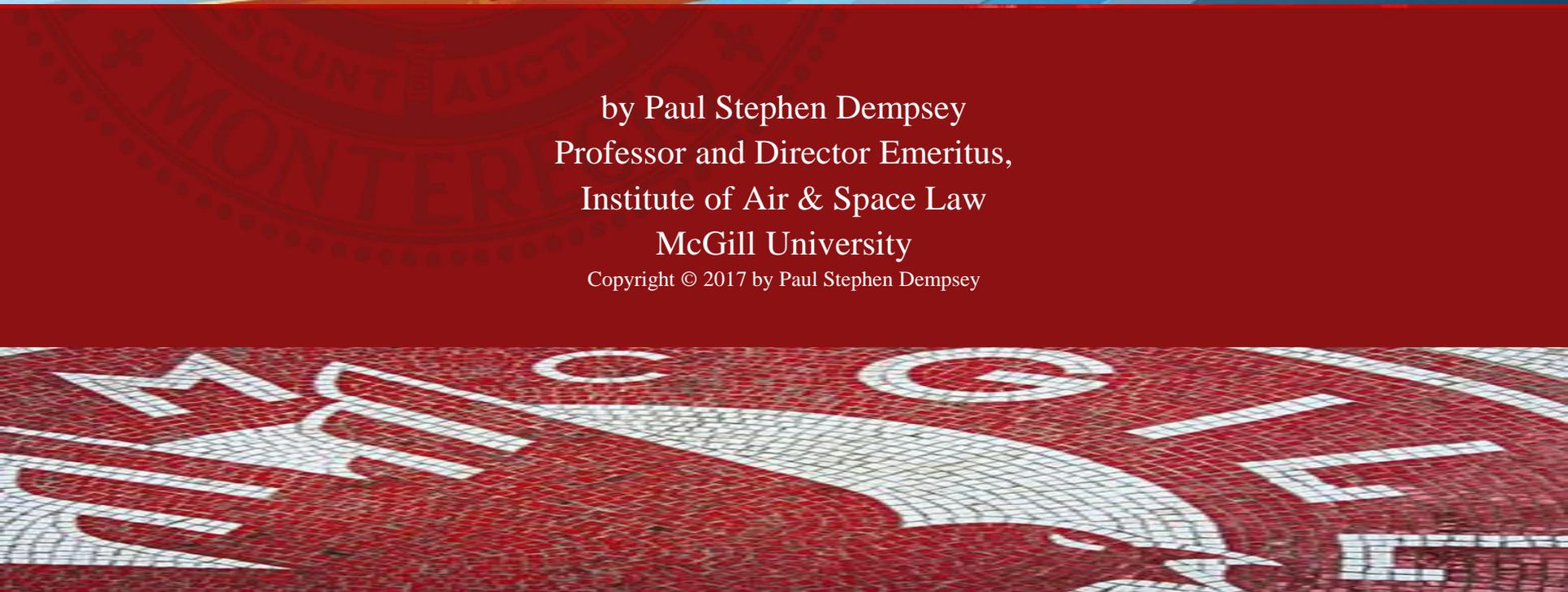




# COMPETITION AND THE ANTITRUST LAWS: Alliances and Antitrust Immunity



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# MERGERS, ALLIANCES & METAL-NEUTRAL JOINT VENTURES

- The competitive landscape in international aviation has changed enormously during the last decade. The regulators have insisted on "metal-neutral joint ventures" as the price of admission for antitrust immunity. Massive mergers also have reduced competition as, in the US, seven major network airlines have been reduced to three, and in the EU the BA, Lufthansa, and Air France conglomerates too have reduced network competition. Meanwhile, many major US and EU alliance airlines complain about the alleged subsidies received by the Middle East airlines, which operate from countries without State Aid prohibitions, and seek a roll back from the ubiquitous "open skies" bilateral air transport agreements with the UAE and Qatar. Airlines are also immune from GATS anti-dumping prohibitions. The result is a regulatory mess with no clear solutions.

# Antitrust Immunity for Airline Alliances: USDOT Analysis

- Is the alliance agreement adverse to the public interest because it would substantially reduce or eliminate competition? Would it facilitate the exercise of market power? Would it increase market concentration? The burden of proof on these issues lie with the opponent.
- If so, is it necessary to meet a serious transportation need or achieve important public benefits? The burden of proof lies with the applicant.
- If so, can those needs or benefits be satisfied by reasonably available alternatives that are materially less anticompetitive? The public benefits require consideration of *inter alia*, international comity and foreign policy factors. The burden of proof lies with the opponent.
- Is the agreement required by the “public interest”? DOT may exempt the agreement from the antitrust laws “to the extent necessary to allow the person to proceed with the transaction” if DOT concludes the exemption is required by the “public interest.” However, DOT insists on an “open skies” bilateral with the State whose flag the airline flies as a prerequisite to antitrust immunity.

*Expanded Star Application*, DOT Order 1009-4-5 (2009). 49 U.S.C. § 41309(b)(1)(A). 49 USC § 41309. *Expanded Star Application*, DOT Order 2009-7-10 (2009). 49 USC § 41308.





## USDOT Analysis

If the agreement contemplates a joint venture similar to a merger, DOT purports to use Clayton Act analysis:

- Will antitrust immunity substantially reduce competition and facilitate the exercise of market power?
- Will the alliance substantially increase market power?
- Will the alliance cause potential competitive harm?
- Will new entry into the market be timely and sufficient to deter or counteract competitive harm?



# Antitrust Immunity: Public Interest ?

- The USDOT insists upon an “open skies” agreement as a prerequisite to antitrust immunity.
- Will the alliance benefit travelers by enabling applicants to offer better and more efficient service?
- Will the alliance enhance competition by providing “new on-line services” [sic]?
- Will the allied carriers be able to improve the efficiency of their operations?



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## Carve-Outs

- “When antitrust immunity has been sought, we have recommended that DOT “carve out” certain unrestricted fares involving these city pairs from the order granting antitrust immunity . . . . For example, the [Antitrust] Division recommended that seven city pairs be carved out of the Delta/Swissair/Sabena/ Austrian alliance (Atlanta-Zurich, Atlanta-Brussels, Cincinnati-Zurich, New York-Brussels, New York-Geneva, New York-Vienna, and New York-Zurich); one for the American/ Canadian Air alliance (New York-Toronto); two for the United/ Lufthansa alliance (Washington-Frankfurt and Chicago-Frankfurt); and two for the United/ Air Canada alliance (Chicago-Toronto and San Francisco-Toronto).”

R. HEWITT PATE  
DEPUTY ASSISTANT ATTORNEY GENERAL

- USDOT no longer requires “carve-outs” and removes them from metal neutral JVs



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## GLOBAL ALLIANCES



# USDOT Wants Integrated Operations

- “We have emphasized the high standard necessary to justify a grant of immunity and the need for applicants to demonstrate that substantial public benefits are likely to be produced at the time the immunity is requested. For example, in the SkyTeam case in 2005, we tentatively denied a request for antitrust immunity because there was both insufficient information in the record to make a complete assessment of public benefits and the competitive conditions were in flux. There . . . the Department identified barriers to integration that we believed reduced the incentives of the airlines to integrate their operations and pass on the benefits of immunized cooperation to consumers.”
- SkyTeam, Docket OST-2004-19214, Show Cause Order 2005-12-12 at 2, 30, and 37 (December 22, 2005).



# USDOT Insists on “Metal Neutrality” as a Prerequisite for Antitrust Immunity

What is Metal Neutrality? “...an industry term meaning that the partners in an alliance are indifferent as to which operates the “metal” (aircraft) when they jointly market services. Without a metal neutral sales environment, the partners have a strong economic incentive to book passengers on their own aircraft in order to retain a larger share of the revenue for themselves, which may not be in the best interest of the consumer or the alliance as a whole. Metal neutrality may be achieved through revenue and/or comprehensive benefit sharing arrangements.”

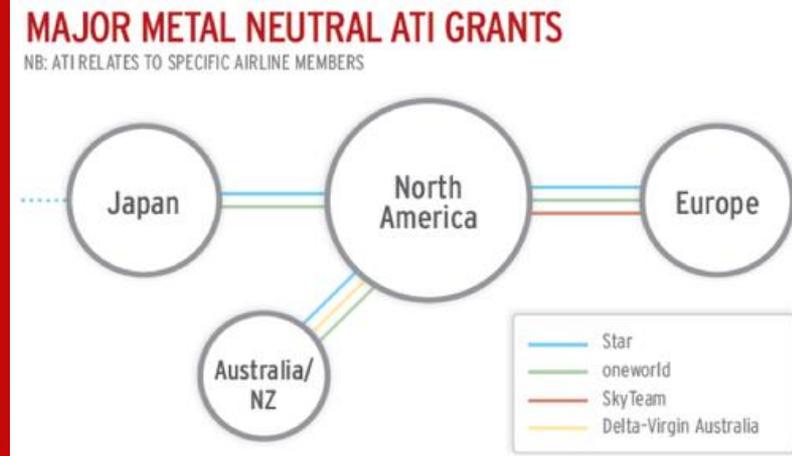
U.S. DOT Joint Application of AMERICAN AIRLINES, INC.; BRITISH AIRWAYS PLC; FINNAIR OY; IBERIA LÍNEAS AÉREAS DE ESPAÑA, S.A.; ROYAL JORDANIAN AIRLINES;

# Antitrust Immunity Conferred by USDOT to:

- American-CAI
- American-British Airways
- American-Finnair
- American-LAN Chile
- American-Sabena-Swissair
- American-TACA Group
- American-Swiss Int'l Air Lines
- Continental-COPA
- Delta-Austrian-Sabena-Swissair
- Delta-Air France-Alitalia-Czech Airlines
- Delta-Korean Air Lines-Air France-Alitalia-Czech Airlines
- Northwest-KLM
- Northwest-KLM-Alitalia
- Northwest-Malaysia
- United-Asiana Airlines
- United-Lufthansa
- United-Lufthansa-SAS
- United-Austrian-Lauda-Lufthansa-SAS
- United-British Midland-Austrian-Lauda-Lufthansa-SAS
- United-Air Canada
- United-Air New Zealand
- SAS-Icelandair



# Metal Neutral Joint Ventures



By 2010, the highest levels of integration under antitrust immunity in “metal neutral” joint ventures had been achieved by the following airlines:

- Air Canada, Lufthansa, United-Continental
- Air France-KLM, Alitalia, Delta
- American, British Airways, Iberia

• European Commission & U.S. Dept of Transportation, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches 7* (2010).

## ALLIANCE MEMBERS WITH ‘HIGH LEVEL COOPERATION’: THE BRIGHTEST PART OF THE SPECTRUM

STAR	ONEWORLD	SKYTEAM
Air Canada	American Airlines	Air France-KLM
Lufthansa	British Airways	Alitalia
United-Continental	Iberia	Delta

## Active Alliances Immunized by USDOT

Sky Team	Star	Oneworld	Other
Delta/Air France- KLM/Alitalia/ Czech/Korean	United/Air Canada /Brussels/Lufthansa /Swiss/Austrian/SAS /LOT/TAP	American/Lan Airlines/Lan Peru	SAS/Iceland air
Delta/Virgin Atlantic/ Air France-KLM/ Alitalia	United/Air New Zealand	American/British Airways/ Iberia/Finnair/Royal Jordanian	Delta/Virgin Australia
	United/Asiana	American/Japan Air Lines	
	United/All Nippon Airways		
	United/COPA		



# Comparison of Alliances

Airline Alliances, Relative Size

	Star			Skyteam			Oneworld		
	2005	2010	2015	2005	2010	2015	2005	2010	2015
Airlines		26	27		13	20		12	14
Passengers (million)	348	545	641	321	384	665	223	298	557
Countries	139	181	192	137	169	177	135	145	161
Destinations	795	1,130	1330	685	815	1062	599	679	1016



# EU Restrictions

- Remedies that constrain operations on certain routes, such as freezes or reductions in capacity and constraints on fares;
- Remedies that require the parties to agree to allow competitors to have access to certain facilities;
- Remedies involving governments, such as requiring relaxation of traffic rights or fares in bilateral air transport agreements; and
- Other remedies, such as restraints on volume discounts, bonus commissions, or CRS display.





# EU Approval Criteria Article 101(3) of the Treaty on the Functioning of the European Union

The European Commission can exempt a restrictive alliance if it believes the overall benefits of the transaction outweighs its anticompetitive effects, and if those benefits will be enjoyed by consumers. Specifically, the EU evaluates the following criteria:

- Does the agreement contribute to improving the production and distribution of goods or promote technical or economic progress;
- Do consumers receive a fair share of the resulting benefits;
- Are the restrictions imposed by the agreements indispensable to the attainment of these objectives; and
- Do the agreements afford the parties the possibility of eliminating competition in respect of a substantial part of the products or services in question?

- European Commission & U.S. Dept of Transportation, *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches* 14 (2010).
- Joos Stragier, *Current Issues in European Air Transport Law and Policy* (address before the European Air Law Assn., Nov. 5, 1999), at [http://ec.europa.eu/competition/speeches/text/sp1999678\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1999678_en.html)



# Alliances: Procompetitive, or Anticompetitive?

Professor Regas Doganis: "there can be little doubt that airline executives see alliances, especially when they involve code-sharing and capacity rationalisation, as a way of reducing or limiting competition."

US Deputy Assistant Attorney General Pate: code-sharing "can result in market allocation, capacity limitations, higher fares, or foreclosure of rivals from markets, all to the injury of consumers."

Brattle Group study: fares have increased significantly more in open skies markets with antitrust immunity than in open skies markets without antitrust immunity

Consumer Reports: code-sharing is a "predatory weapon."

Edward Hasbrouck, author of "The Practical Nomad": "Code sharing is unnecessary for, indeed irrelevant to, any legitimate purpose or actual service. Code sharing doesn't enable an airline to fly to any more places. It just enables the airline to mislead travellers into thinking that they fly to places they don't. I call that fraud."

Michael O'Leary, CEO Ryanair: "Code-sharing, alliances, and connections are all about how do we screw the poor customer for more money?"

Tim Clark, CEO Emirates: "We see alliances as having significant anti-competitive elements and believe that our membership in one would be an artificial brake on our own business plans."

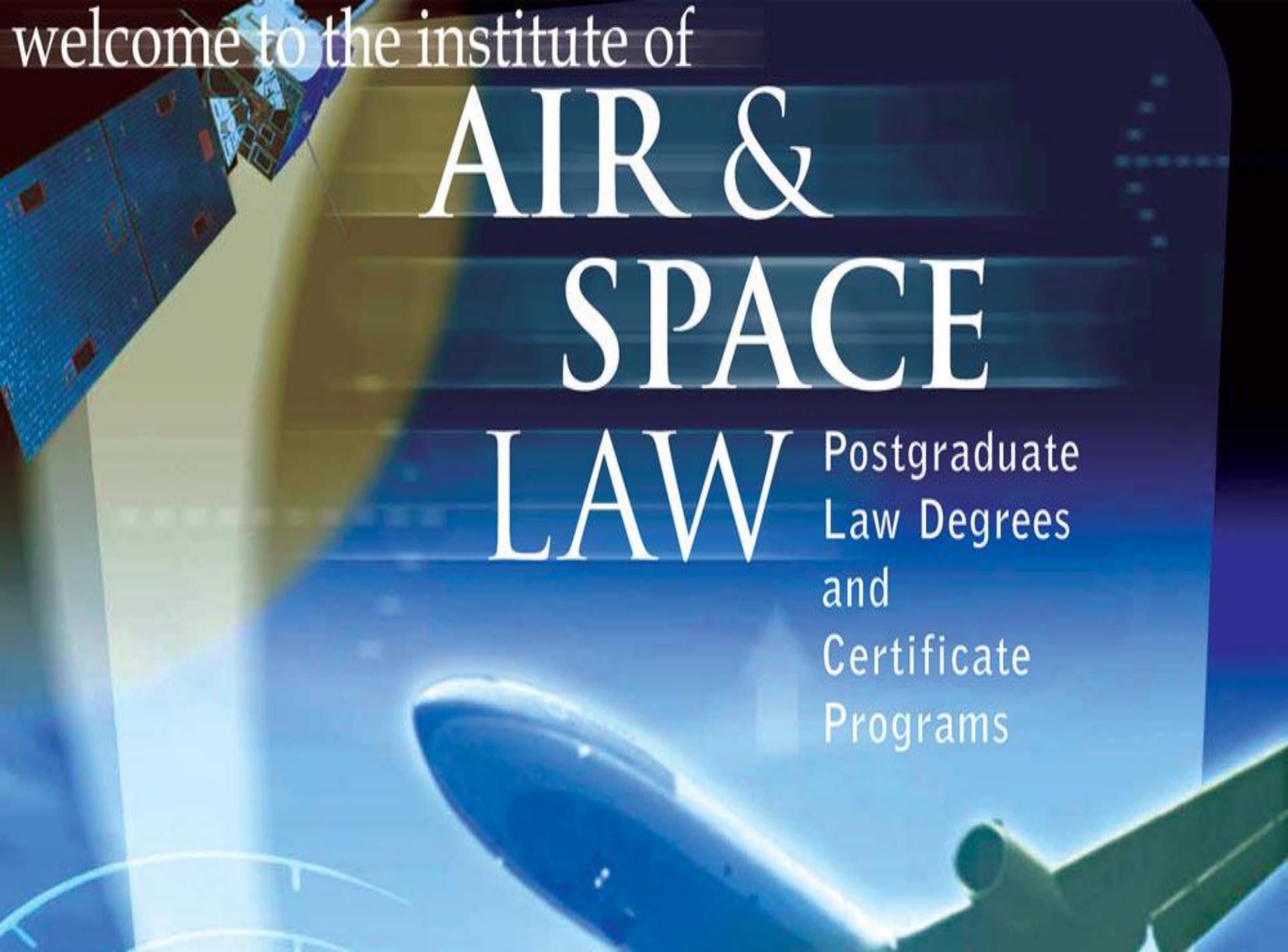
Gillespie & Richard: "the loss of competition in trans-Atlantic routes with non-stop service as a result of antitrust immunity grants adversely affects consumers."



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