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Regularien & Normen

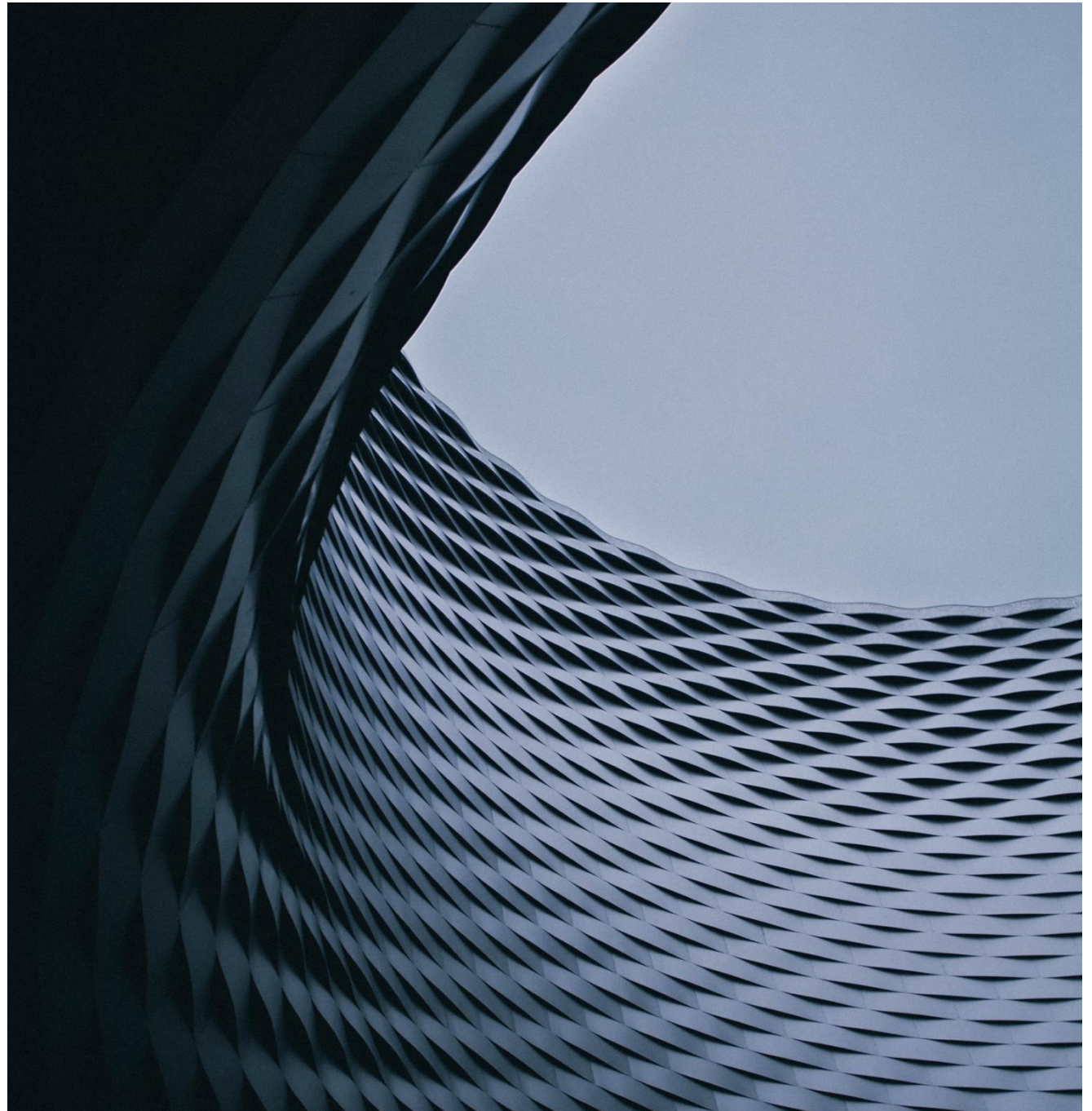
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Sustainability Circle Roundtable

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Introduction

ESG emerges in a fragmented context of established standards under private and public law and a range of newly emergent non-binding standards, guidelines and principles.

The separation between hard and soft law is blurred, and the soft law guidelines, standards and codes of conduct continue to define the social, political and legal expectations of companies' ESG conduct.

ESG: From soft law to hard currency provisions

Within the “hard currency” legislation, we observe a shift from mere reporting and transparency obligations, relying on the comply or explain concept, to binding human rights due diligence obligations (hereinafter “HRDD obligations”).

Lawmakers have introduced civil, administrative and criminal liability to police and sanction the violation of human rights and environmental norms in relation to new HRDD obligations (e.g. Loi de Vigilance, Lieferkettengesetz, Norwegian Transparency Act).

Examples of hard currency provisions:

EU Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU (Non-Financial Reporting Directive) as regards disclosure of non-financial and diversity information by certain large undertakings and groups;

English Modern Slavery Act of 2015;

French Duty of Vigilance Law of 2017;

Australian Modern Slavery Act (2018);

EU Regulation 2019/2089 amending EU Regulation 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (2019);

EU Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (2019) and the EU Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, amending EU Regulation 2019/2088 (2020) (Sustainable Finance Disclosure Regulation), which, as of 2023, will require disclosure of ESG considerations by all funds;

German Supply Chain Act of 2021;

Norwegian Transparency Act of 2021;

EU Corporate Sustainability Reporting Directive amending the EU Non-Financial Reporting Directive (2021; to be adopted in 2022);

Proposal of the EU Commission for a Directive on Corporate Sustainability Due Diligence (2022), which includes due diligence obligations in the ESG area, an administrative supervisory mechanism and civil liability;

Art. 964a et seq. in the Swiss Code of Obligations on the reporting on non-financial information and selective, issues-specific human rights due diligence obligations (2022)

Switzerland

Publicly traded companies and FINMA regulated financial institutions which meet the statutory thresholds should now start preparing for the new due diligence and non-financial reporting obligations of the Swiss Code of Obligations (CO).

Art. 964a et seq. of the Swiss Code of Obligations ("CO"), which entered into force on 1 January 2022, includes:

- non-financial reporting obligations on environmental, social, labour, human rights and bribery matters; and
- specific due diligence and reporting obligations in the areas of conflict minerals and child labour.

Art. 325ter of the Swiss Criminal Code ("CC") imposes criminal liability on individuals failing to comply with the new reporting obligations.



Background

In 2015, the responsible business initiative was launched by a broad coalition of civil society organisations. The Swiss parliament agreed on an indirect counter-proposal in June 2020.

In the November 2020 popular vote, a narrow majority of the Swiss population approved the responsible business initiative, but the initiative failed to reach the required majority of the cantonal votes and the indirect counter-proposal became valid following expiry of the referendum period.

This act was implemented on January 1 2022 in Art. 964a et seq. of the Swiss Code of Obligations (CO).

01/
Reporting
Obligations



1.1 Reporting on Non-Financial Matters

Reporting on non-financial matters in accordance with Art. 964a para. 1 CO affects companies with the following cumulative characteristics:



Public Interest Companies

Public interest companies (as defined in the Audit Supervisory Act) are public companies and companies subject to the Financial Market Supervisory Authority's oversight. Under Art. 727 CO, public companies are listed companies and companies with outstanding bonds.



≥500 FTE

Companies with an annual average of at least 500 full-time employees in two consecutive financial years on a consolidated basis (i.e. including all controlled companies).



Thresholds

At least one of the following values exceeded in two consecutive financial years: (i) balance sheet total of CHF 20 million, or (ii) turnover of CHF 40 million.

These companies, including all controlled subsidiaries worldwide, must report as of 2024 on environmental, social, labour, human rights and anti-corruption matters. They must prepare an annual report providing information on their business and show how their business activities affect the above-mentioned non-financial matters.

The report needs to contain information required for the understanding of the course of business, the results of operations, the position of the company and the effects of its activities on the non-financial matters (Art. 964b para. 1 CO).

In particular, the report must include the following (Art. 964b para. 2 CO):

1	Activity	A description of the business model.
2	Concept	A description of the standards adopted on the reporting topics / reporting matters, including the due diligence applied.
3	Effectiveness	A presentation of the measures taken to implement these standards and an evaluation of their effectiveness.
4	Risk	A description of the main risks related to the reporting matters associated with the business model and the company's management of those risks – in particular, those arising from the company's own business activities, and, if relevant and proportionate, any arising from its business relationships, products or services.
5	KPI's	Key performance indicators for the company's activities relating to the reported matters.

Companies controlled by a reporting company are exempt from reporting obligations.

Companies controlled by an entity that prepares an equivalent report under applicable foreign law are exempt from the reporting obligation (Art. 964a para. 2 CO).

The role of the board

Non-financial reports must be signed by the board of directors and made publicly available for at least 10 years (Art. 964c para. 2 CO).

Comply or explain

If a company does not follow any standard with respect to one or more non-financial matters, this is not against the law, but the reasons must be clearly explained in the report ("comply or explain" according to Art. 964b para. 5 CO). This implicitly presupposes that as a rule the reporting is based on a recognised standard, for instance ISO 37001 (anti-bribery management systems) regarding the management of bribery risk.

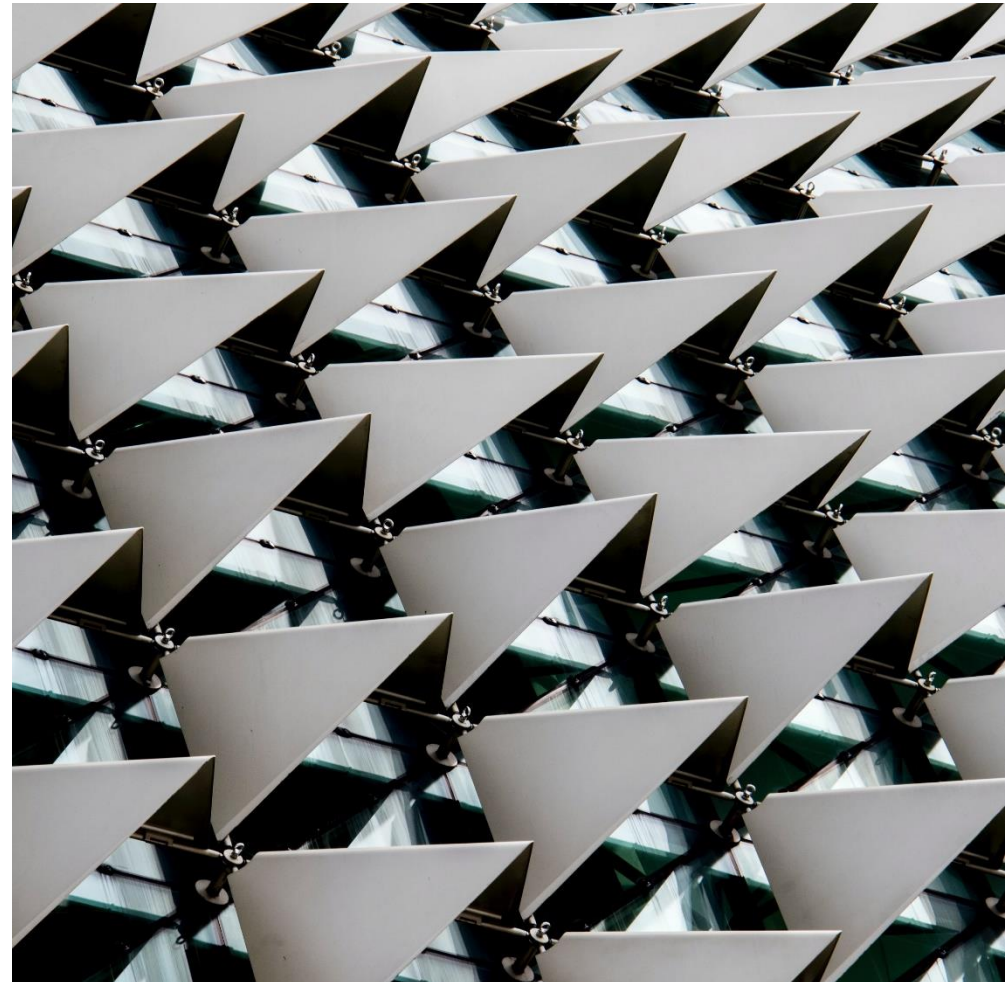
1.2 Due Diligence on Conflict Minerals and Child Labour

Companies with their registered office, head office or principal place of business in Switzerland that freely put into circulation certain quantities of specific minerals or metals (in particular tin, tantalum, tungsten, their ores or minerals, and metals containing gold) from conflict and high-risk areas, into Switzerland (or process them in Switzerland), are subject to due diligence requirements (Art. 964j para. 1 no. 1 CO).

The applicable import and processing quantities are set annually by the Federal Council in the Ordinance on Due Diligence and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labour ("the Ordinance") and are based on the threshold values applicable in the EU (EU Ordinance 2017/821).

Due diligence obligations on child labour apply to companies with their registered office, head office or principal place of business in Switzerland that offer products or services for which there is a tangible suspicion that they have been manufactured or provided using child labour (Art. 964j para. 1 no. 2 CO).

The only exceptions are so-called "low-risk companies" and SMEs. If the use of child labour is obvious, the exceptions do not apply (Art. 8 of the Ordinance). In the case of exemptions for SMEs, the thresholds that apply to the ordinary audit of the annual financial statements have to be considered.



SME's which, together with the domestic and foreign companies they control, fall below two of the following thresholds in two consecutive financial years are exempt from reporting on child labour risk (Art. 6 of the Ordinance):



Balance Sheet
Total CHF 20 MIO



250 FTE
Annual Average



Sales Revenue
of CHF 40 MIO

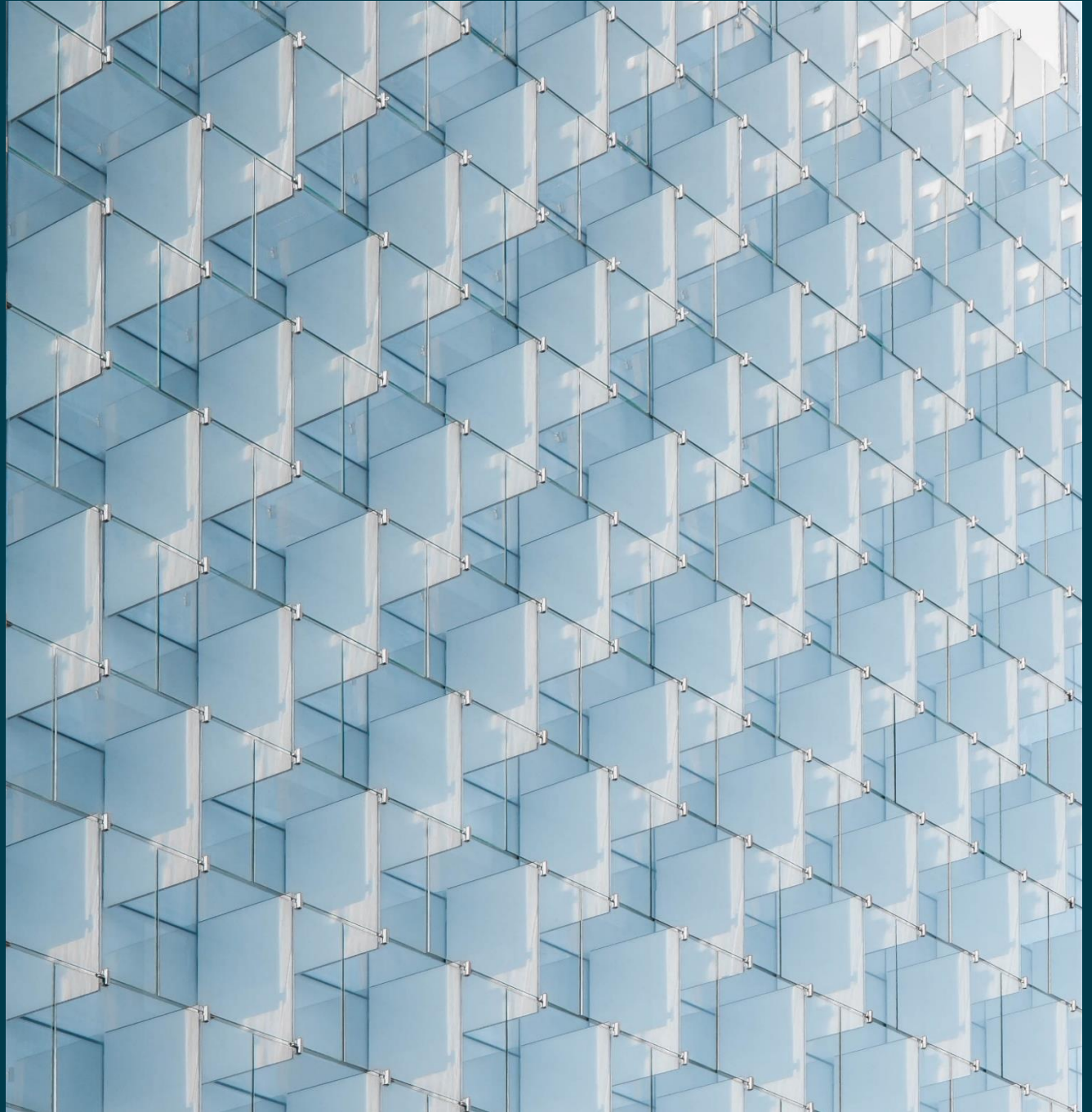
Due Diligence Requirements:

- 1 Establishment of a management system and definition of a supply chain policy
- 2 Identification and assessment of risks in the supply chain
- 3 Establishment of a risk management plan with concrete measures to avoid or minimise the identified risks
- 4 An annual report
- 5 (For conflict minerals) An audit conducted by an external independent third party (Art. 964k para. 3 CO)

1.3 Sanctions

All directors signing and approving the reports who (i) make false statements on non-financial information, conflict minerals and child labour, or fail to report, or (ii) fail to comply with the legal obligation to keep and document the reports, are liable to a criminal fine of up to CHF 100,000 (Art. 325ter CC). Negligence is punishable by a fine of up to CHF 50,000 and sanctions are imposed on the responsible natural persons within the companies (i.e. the board members) – not on the legal entities themselves.

02/ Implications



2.1 Three Main Challenges

For many of the companies concerned, the identification, analysis and evaluation of non-financial risks represents a major challenge.

Similarly, the introduction of a management system for trade in conflict minerals or child labour – and the fact that supply chains must be handled diligently and transparently – will be uncharted territory for many.

The new criminal provision also puts additional pressure on companies and their senior management to publish complete and accurate reports.

2.2 Timeline of New Reporting System

The Federal Council put the new provisions of the CO and the Ordinance into force on 1 January 2022. The law allows companies one year to adapt to the new obligations (i.e. until the end of 2022). Consequently, the new obligations will be applied in the 2023 financial year and the non-financial reports are due for signature and approval by all members of the board and subsequently the shareholders, with publication for the first time by the end of June 2024.



1) In March 2022, the Federal Council also opened the consultation on the implementing ordinance on climate reporting by large companies. The ordinance specifies existing disclosure requirements for environmental non-financial matters and is expected to come into force at the beginning of the financial year 2023.

2.3 Litigation Risks in the ESG Context

ESG-Litigation typically addresses the following problems and can broadly be grouped along the buzzwords of ESG (“Environment”, “Social” and “Governance”):

Environment	Claims related to environmental pollution, climate change and reporting of companies on their CO2 emissions (“green-washing”)
Social	Claims in relation to infringements of human rights and labour rights in value chains and the complicity of companies with state actions that violate human rights
Governance	Claims related to corruption and money laundering and corporate governance

A further distinctive element of ESG-Litigation is the wide range of resolution mechanisms spanning from judicial state-based enforcement to non-judicial, quasi-judicial and company-specific grievance procedures.

Reporting obligations increase litigation and prosecution risks, since possible litigants may access information that they can use against the companies.

Examples of cases:

- Shell
- DWS
- Syngenta
- Holcim



2.4 Do's and Don'ts

The main ESG litigation risks arise from reputational damage and legal sanctions of corporate activities that have an adverse impact on the environment and climate, human and labour rights and other social issues.

These risks can be tackled by centre staging the governance dimension of ESG. This includes the structure, processes, decision-making powers within a corporation. It also entails softer factors such as the corporate culture and values amongst the employees.

Disclaimer

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