

Ostrołęka C: Energa's and Enea's Board Members' Fiduciary Duties to the Companies and Shareholders

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Introduction

1. The ongoing actions of Energa's and Enea's Management Board and Supervisory Board risk breaching board members' fiduciary duties of due diligence and to act in the best interests of the companies and their shareholders. In particular:
 - a. Energa and Enea appear intent on pursuing the proposed new Ostrołęka C coal-fired power plant project despite compelling evidence from independent economic analysts, rating agencies and energy industry experts that the project is liable to be unprofitable and harmful to the interests of the company and its shareholders.
 - b. Recent media reports suggest Energa and Enea are considering issuing a notice to proceed ("**NTP**") prior to the capacity market auction on 21 December 2018. This would contradict Energa's previous assurances to the market that it would only move to an NTP following the successful completion of the auction. Such a precipitous move would risk a rating downgrade of both companies (in light of a specific indication to this effect from Fitch) and risk committing Energa and Enea to the project before, on any reasonable view, its profitability could be assured.
 - c. Enea has proposed a resolution at an upcoming extraordinary general meeting to be held on Monday 24 September 2018 to express "*qualified consent to commence the Construction Stage of the Project Ostrołęka C*",¹ a precondition to the issue of an NTP.
2. ClientEarth, a shareholder in Energa and Enea, has sought urgent confirmation that Energa's and Enea's Supervisory Boards will not consent (and Energa and Enea will not) issue an NTP before the capacity market auction is held and won and until a determination is made that the contract secured is sufficient to ensure the project's profitability, in accordance with previous statements to the market.
3. Whilst ClientEarth is an environmental organisation, it is also a shareholder of Energa and Enea and is entitled to the relevant rights of recourse that vest in any shareholder of the companies. More broadly, ClientEarth's concerns reflect:
 - a. Broader concerns of Energa's minority shareholders, reflected in 37% of the minority shareholders present at Energa's extraordinary general meeting on 3

¹ Enea, Current Report No. 48/2018, 28 August 2018, <http://investors.enea.pl/en/pr/400432/draft-resolutions-of-the-extraordinary-general-meeting-of-enea-s-a-con>.

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September 2018 having voted against the resolution consenting to moving to the construction phase (with a further 7% abstaining) with a formal objection lodged to that resolution.²

- b. The increasing concerns of global institutional investors generally about the financial implications of investment in coal assets, given their high CO₂ content and the high risk of stranded assets. In this case, as demonstrated by the economic analysis referred to below, the fall in the price of renewable energy sources and rising carbon prices have continued to undermine the economics of Ostrołęka C.

Ostrołęka C's lack of profitability

4. Ostrołęka C is a major investment for the two companies. Energa's and Enea's 50% shares of the €1.2 billion overnight capital cost of the project represent c. 70% and 65% of their respective market capitalisation.³
5. Energa and Enea have repeatedly sought to assure their shareholders that Ostrołęka C will be profitable and that profitability is a condition of proceeding to the construction stage:
 - a. On 30 November 2016, Energa stated in a stock exchange report that "*Upon completion of the Development Stage the Parties are obligated to participate in the Construction Stage provided that the Project is profitable and the Project funding does not breach the Parties' covenants.*"⁴
 - b. On 30 November 2016, Enea stated in a stock exchange report that "*After the Development Stage Enea S.A. is obliged to participate in the Construction Stage with the assumption that the Project profitability condition is satisfied, and Project financing will not infringe upon the Company's bank covenants.*"⁵ Fitch emphasised this in its rating action commentary, which stated on 30 June 2017

² Minority shareholders represented 64,106,208 shares at Energa's 3 September 2018 extraordinary general meeting (i.e. the total of 277,432,525 less the Polish State Treasury's 144,928,000 BB shares and 68,398,317 AA shares). There were 23,557,637 votes against and 4,600,000 abstentions. See Energa, Current Report No. 41/2018, 3 September 2018, <https://ir.energa.pl/en/pr/401223/current-report-no-41-2018> and Energa, Information about the total number of shares and votes, https://secure.sitebees.com/file/static/21154/49/information_about_the_total_number_of_shares_and_votes.pdf.

³ See Carbon Tracker, Burning more money than coal: The asset economics and financial implications of Energa's and Enea's proposed new Ostrołęka coal power plant C, August 2018, p 9, <https://www.carbontracker.org/reports/burning-more-money-than-coal/>.

⁴ Energa, Current Report No. 44/2016, 30 November 2016, <https://ir.energa.pl/en/pr/336983/current-report-no-44-2016>.

⁵ Enea, Current Report No. 37/2016, 30 November 2016, <http://investors.enea.pl/en/pr/336975/approval-by-enea-s-a-s-supervisory-board-of-the-joint-engagement-with-energa-s-a-in-the-preparation-for-construction-construction-and-exploitation-of-the-new-power-unit-in-ostroleka-power-plant>.

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- that “[Enea] is entitled to withdraw from the project until the final decision to construct is taken (probably in 2018) if the project turns out to be unprofitable”.⁶
- c. On 7 July 2017, in response to shareholder questions at its annual general meeting, Energa stated in a stock exchange report without qualification that the project “*will be profitable and will increase the Company’s value for all the shareholders...*”.⁷
 - d. On 30 August 2018, in response to questions from Bloomberg News, Energa spokesman Adam Kasprzyk was reported as stating the “*project is profitable based on price forecasts prepared by an ‘independent adviser’*”.⁸ Energa did not provide further details.⁹
 - e. On 10 September 2018, S&P Global Platts reported that Energa said “[t]he business rationale was being confirmed at every stage of the project, which would not enter construction unless it had a positive net present value”.¹⁰
6. Energa’s and Enea’s assertions as to the profitability of Ostrołęka C are contradicted by numerous independent economic analyses, rating agencies and energy industry experts. Enea itself describes as a “core risk” the “*risk of failure to meet the economic objectives of the planned construction of the Ostrołęka C Power Plant*”.¹¹

Carbon Tracker report

- 7. ClientEarth has commissioned an economic analysis from financial think tank Carbon Tracker on the asset economics and financial implications of Ostrołęka C.¹² Carbon Tracker’s report finds that the plant will be “*permanently unprofitable without out-of-market revenues in the form of capacity market payments*”, with a negative net present value of up to €1.7 billion.
- 8. Carbon Tracker’s report also notes that capacity market payments are not guaranteed:

⁶ Fitch Ratings, Fitch Affirms ENEA at 'BBB'; Outlook Stable, 30 June 2017, http://investors.enea.pl/file/attachment/1135177/4e/2017_06_30_fitch_affirms_enea_at_bbb_outlook_stable.pdf.

⁷ Energa, Current Report No. 32/2017, 7 July 2017, <https://ir.energa.pl/en/pr/361192/current-report-no-32-2017>.

⁸ Bloomberg, Poland’s Energa Says Ostroleka Power Plant Project Is Profitable, 30 August 2018.

⁹ Bloomberg, Poland’s Energa Says Ostroleka Power Plant Project Is Profitable, 30 August 2018.

¹⁰ S&P Global Platts, Ostroleka C ‘will be competitive’: Energa, 10 September 2018.

¹¹ Enea, Report of the Management Board on the operation of ENEA group in H1 2018, 13 September 2018, p 51,

http://investors.enea.pl/file/attachment/1315280/e/report_of_the_management_board_on_the_operation_of_enea_group_in_h1_2018.pdf.

¹² Carbon Tracker, Burning more money than coal: The asset economics and financial implications of Energa’s and Enea’s proposed new Ostrołęka coal power plant C, August 2018, <https://www.carbontracker.org/reports/burning-more-money-than-coal/>.

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- a. Ostrołęka C will get the same 15-year price as the one-year price of existing capacity. Existing capacity, which tends to have a lower long-run marginal cost, risks pushing the capacity market price lower than expected (as occurred in the United Kingdom).
 - b. The 15-year contract could be cut short, due to the European Commission's proposed prohibition of capacity market payments for new plants emitting more than 550 grams CO₂/kWh (approximately one-third less than Ostrołęka C's potential carbon intensity). Energa expressly acknowledges this risk in its 2017 Management Board report, noting the potential need to implement new EU legislation in the Polish capacity market legislation and that there is "[n]o guarantee that the beneficiaries of the capacity auctions for 2018-2019 will retain acquired rights".¹³
 - c. If Ostrołęka C's EBIT shortfall over its first 15 years of operation is met from capacity market payments, it would require c. €1.2 billion capacity market payments, which would likely generate significant resistance from other groups, particularly given references in the 2014 Supreme Audit Office's report on Ostrołęka C that the project was not necessary for Polish energy security.¹⁴
9. Carbon Tracker accordingly finds that Ostrołęka C "*presents a clear and obvious financial risk for investors in Energa and Enea*" and "*risks destroying shareholder value unnecessarily*".¹⁵

Longstanding criticism of the economic viability of Ostrołęka C

10. Carbon Tracker's analysis is supported by longstanding public criticism of the economic viability of Ostrołęka C from a variety of reputable sources, including:
- a. EuroRating, which on 18 July 2018 downgraded Energa following its entering into the construction contract for Ostrołęka C. EuroRating stated that Energa's plan to issue an NTP before the capacity market auction involved a "*significant risk*" of committing it to a project that may prove permanently unprofitable,

¹³ Energa Management Board report for the year ended 31 December 2017, pp 91-92, https://secure.sitebees.com/file/attachment/1247045/6b/4._management_board_report_on_the_activity_of_the_energa_capital_group_for_the_year_ended_31_december_2017.pdf.

¹⁴ See Supreme Audit Office, Report KGP – 4101-001-06/2014, P/14/018, June 2014, p 10, https://www.nik.gov.pl/kontrol/wyniki-kontroli-nik/pobierz,kgp~p_14_018_201404300758141398844694~id5~01,typ,kj.pdf. See also CIRE, Myślecki: budowa bloku 1000 MW w Ostrołęce nieuzasadniona i nieopłacalna, 28 January 2018, <https://www.cire.pl/item,157776,1,0,0,0,0,myslecki-budowa-bloku-1000-mw-w-ostrolece-nieuzasadniona-i-nieoplacalna.html> and WysokieNapiecie.pl, The last coal power plant in Poland may be only wishful thinking, 27 August 2018, <https://wysokienapiecie.pl/12645-last-coal-power-plant-poland-may-wishful-thinking/>.

¹⁵ Carbon Tracker, Burning more money than coal: The asset economics and financial implications of Energa's and Enea's proposed new Ostrołęka coal power plant C, August 2018, p 9, <https://www.carbontracker.org/reports/burning-more-money-than-coal/>.

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- particularly if the price of emission allowances continues to rise and the price of renewable energy continues to decline.¹⁶
- b. Fitch, which on 27 September 2016 described Ostrołęka C as “*credit-negative*” for both companies and stated that “*Fitch believes that it will be challenging for the investment in Ostroleka to achieve a reasonable return...*”.¹⁷ On 28 November 2016, Fitch stated that “*In our view, the reinstatement of Ostroleka C increases business risks for Energa given weak market conditions for conventional power generation.*”¹⁸ On 30 June 2017, Fitch noted that Enea’s “[i]nvolvement in Ostroleka C project construction phase as a 50% partner, without secured cash flow support from the capacity market” may lead to negative rating action.¹⁹ On 21 March 2018, Fitch noted that construction of Ostrołęka C “*without secured capacity payments for the project and without the involvement of financial investors*” may lead to negative rating action.²⁰
 - c. Former Energa Group company director Dr Wojciech Myślecki, who on 28 January 2018 stated that “*in my opinion the construction of the new unit is economically unprofitable, and from the point of view of the electric-energy system it is unjustified*”.²¹
 - d. Energy portal WysokieNapiecie.pl, which on 3 January 2018 described Ostrołęka C as “*completely unrealistic*” and referred to the “*colossal problems*” Energa and Enea will face financing the project.²²
 - e. Michał Hetmański of Instrat Foundation, who in a report dated August 2018 described Ostrołęka C as “*fundamentally unviable*” with a negative NPV of €0.5 billion.²³

¹⁶ EuroRating, Obniżenie ratingu kredytowego spółki Energa S.A. z BBB do BBB-, 18 July 2018, p 2, http://www.eurorating.com/files/91740803/file/2018-07-18_obnizenie_ratingu_Energa_SA_do_BBB-.pdf.

¹⁷ Fitch Ratings, Fitch: Potential Investments Credit-Negative for Energa and ENEA, 27 September 2016, <https://www.fitchratings.com/site/pr/1012224>.

¹⁸ Fitch Ratings, Fitch Affirms Poland's Energa at 'BBB'; Outlook Stable, 28 November 2016, <https://www.fitchratings.com/site/pr/1015414>.

¹⁹ Fitch Ratings, Fitch Affirms ENEA at 'BBB'; Outlook Stable, 30 June 2017, http://investors.enea.pl/file/attachment/1135177/4e/2017_06_30_fitch_affirms_enea_at_bbb_outlook_stable.pdf.

²⁰ Fitch Ratings, Fitch Affirms Poland's Energa at 'BBB'; Outlook Stable, 21 March 2018, <https://www.fitchratings.com/site/pr/10024448>.

²¹ CIRE, Myślecki: budowa bloku 1000 MW w Ostrołęce nieuzasadniona i nieopłacalna, 28 January 2018, <https://www.cire.pl/item,157776,1,0,0,0,0,myslecki-budowa-bloku-1000-mw-w-ostrolece-nieuzasadniona-i-nieoplacalna.html>.

²² WysokieNapiecie.pl, Nowa elektrownia w Ostrołęce wystrzelona w kosmos, 3 January 2018, <https://wysokienapiecie.pl/7143-nowa-elektrownia-w-ostrolece-wystrzelona-w-kosmos/>.

²³ Michał Hetmański, OSTROŁEKA C – Next steps for Europe's last coal power plant, August 2018, http://elektrowniaostroleka.com/upload/filemanager/StopEOC/Dokumenty/raport_ostroleka3_www_en.pdf.

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- f. Energa's four own economic analyses commissioned in January, July and August 2012 from Ernst & Young when Energa alone was pursuing the project, finding in each case that the project did not meet applicable NPV or IRR thresholds, which led to the original abandonment of the project.²⁴
11. Contrary to Energa's statement that Ostrołęka C "*will be profitable and will increase the Company's value for all the shareholders*",²⁵ the project is projected to be permanently unprofitable and diminish shareholder value as a result. That Energa and Enea appear intent on proceeding with Ostrołęka C despite the above evidence raises questions whether members of Energa's and Enea's Management Board and Supervisory Board are acting with the necessary due diligence and in the best interests of the companies and their shareholders in doing so.

The apparent reversal of the position that Energa and Enea would only issue an NTP after the capacity market auction is held and won

12. Energa has previously stated to the market without qualification that an NTP would only issue after the capacity market action (since scheduled for 21 December 2018) has been held and won. In particular:
 - a. Energa's Eurobond prospectus dated 16 February 2017 stated that: "*The Group aims to be ready to commence construction of a new coal-fired unit (Ostrołęka C) in 2018 and to commission the unit by the end of 2023. The strategy is to ensure the project's profitability through participation in the expected capacity market mechanism and a favourable coal supply agreement. The fuel supply agreement has been signed in 2016. Therefore, once the capacity auction has been won, the general contractor of the plant may be formally selected and given a Notice to Proceed to the construction stage.*"²⁶
 - b. Fitch's rating action commentary of 21 March 2018 similarly stated that: "*We understand from Energa that notice to proceed with the project will only be issued if Ostroleka C wins a capacity market auction scheduled for late 2018, which would enhance the project's cash flows.*"²⁷

²⁴ See Supreme Audit Office, Report KGP – 4101-001-06/2014, P/14/018, June 2014, p 7, https://www.nik.gov.pl/kontrola/wyniki-kontroli-nik/pobierz_kgp~p_14_018_201404300758141398844694~id5~01.typ.kj.pdf.

²⁵ Energa, Current Report No. 32/2017, 7 July 2017, <https://ir.energa.pl/en/pr/361192/current-report-no-32-2017>.

²⁶ Energa Finance AB (publ), Prospectus dated 16 February 2017, p 81, <https://www.bourse.lu/security/XS1575640054/248345>.

²⁷ Fitch Ratings, Fitch Affirms Poland's Energa at 'BBB'; Outlook Stable, 21 March 2018, <https://www.fitchratings.com/site/pr/10024448>.

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- c. S&P Global Platts reported on 10 September 2018 that “[a] notice to proceed has yet to be issued to the contractors, with Energa saying construction is dependent on capacity market payments.”²⁸
13. Despite Energa's unqualified statements in this regard, Michael Kerouille of GE Power was reported as stating in July 2018 that the consortium expects to receive an NTP “in three months” (i.e. in October 2018).²⁹ Enea's CEO was also recently reported as stating that an NTP could be issued before the capacity market auction in December 2018.³⁰
14. ClientEarth regards it as inconceivable that Energa and Enea would issue an NTP before the results of the capacity market auction. This would:
 - a. Directly contradict Energa's previous statements to the market and to Fitch as recently as March 2018. Fitch has also specifically stated that Energa's and Enea's involvement in the construction phase without secured capacity market payments may lead to negative rating action.³¹
 - b. Risk committing Energa and Enea to a project before, on any view, its profitability could be assured. Until the NTP is issued, Energa and Enea have stated that they can withdraw from the project should it not be profitable (e.g. if capacity market payments are less than assumed).³²

Financing concerns

15. On 9 August 2017, Energa's CFO “told reporters that the financing model for Ostrołęka should be ready within a month”.³³ On 4 September 2018, more than a year later, Energa and Enea announced a memorandum of understanding concerning potential engagement, limited to “a commitment to negotiate in good faith” and “subject to and depends on a number of legal, corporate and financial conditions, including on the market situation.”³⁴ The memorandum of understanding is effective until 30 November

²⁸ S&P Global Platts, Ostrołęka C ‘will be competitive’: Energa, 10 September 2018.

²⁹ PAP, Konsorcjum GE spodziewa się otrzymać polecenia rozpoczęcia prac dla Ostrołęki C za trzy miesiące, 12 July 2018, <http://biznes.pap.pl/en/news/pap/info/2577281.konsorcjum-ge-spodziewa-sie-otrzymac-polecenia-rozpozecia-prac-dla-ostroleki-c-za-trzy-miesiace>.

³⁰ BiznesAlert, Stępiński: Ostrołęka jak Waterloo, 31 August 2018, <https://biznesalert.pl/elektrownia-ostroleka-koszty-carbon-tracker-instrat/>.

³¹ Fitch Ratings, Fitch Affirms Poland's Energa at 'BBB'; Outlook Stable, 21 March 2018, <https://www.fitchratings.com/site/pr/10024448>; Fitch Ratings, Fitch Affirms ENEA at 'BBB'; Outlook Stable, 30 June 2017, http://investors.enea.pl/file/attachment/1135177/4e/2017_06_30_fitch_affirms_enea_at_bbb_ou_tlook_stable.pdf.

³² See para 5.a above.

³³ Reuters, Poland's Energa plans new coal-fuelled unit irrespective of power capacity scheme, 9 August 2017, <https://www.reuters.com/article/energa-poland-idUSL5N1KV2IS>.

³⁴ Energa, Current Report No. 42/2018, 4 September 2018, <https://ir.energa.pl/en/pr/401224/current-report-no-42-2018>; Enea, Current Report No. 49/2018,

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2018. The preliminary financing structure announced would see Energa and Enea contribute PLN 1 billion each, with the fund contributing a further PLN 1 billion. This would result in a shortfall of over PLN 2 billion, which is said to be “*contributed by other forms of financing*”.³⁵

16. The present position raises a number of concerns:
 - a. Issuing an NTP before Energa and Enea have confirmed third-party financing would be premature. Even the existing limited memorandum of understanding would leave a PLN 2 billion shortfall.³⁶ The financing terms will inform whether the project has even a chance of being profitable – which is expressed to be a condition of issuing an NTP.³⁷
 - b. Commencing construction without involving financial investors would risk a rating downgrade, as Fitch has specifically stated in respect of both companies.³⁸
 - c. The extent of Energa's proposed financing will also need to be considered in light of the restrictions on Energa's Eurobond proceeds being used for Ostrołęka C. The final terms of the €300m Eurobonds issued on 7 March 2017 state that “[t]his facility will not be used for new power generation projects”³⁹ (or, as it was expressed in Energa's 2017 management report, the application of the funds raised would “*exclud[e] investments in coal assets*”).⁴⁰ It will be important that these terms are observed.

Legal risks

17. Given the history of this project, it is troubling that Energa and Enea may spend an estimated €52 and €78 million on the development stage alone.⁴¹ In ClientEarth's view, proceeding to the construction stage would involve significant and unacceptable risks to Energa, Enea, the members of their Management Boards and Supervisory Boards, and their shareholders.
18. Energa's and Enea's Management Boards and Supervisory Boards are subject to legal duties to:

4 September 2018, <http://investors.enea.pl/en/pr/401200/conclusion-of-a-memorandum-of-understanding-concerning-capital-engagem>.

³⁵ Ibid.

³⁶ Ibid.

³⁷ See footnotes 4 and 5 above.

³⁸ See para 10.b above.

³⁹ Final Terms dated 3 March 2017, p 5, <https://www.bourse.lu/security/XS1575640054/248345>.

⁴⁰ Energa Management Board report for the year ended 31 December 2017, p 36, https://secure.sitebees.com/file/attachment/1247045/6b/4._management_board_report_on_the_activity_of_the_energa_capital_group_for_the_year_ended_31_december_2017.pdf.

⁴¹ See Energa, Current Report No. 12/2018, 26 March 2018, <https://ir.energa.pl/en/pr/387434/current-report-no-12-2018>; Enea, Current Report No. 13/2018, 26 March 2018, .

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- a. Discharge their duties with the diligence proper for the professional nature of their activities.
- b. Act in the best interests of the respective company and their respective shareholders taken as a whole.

Enea's upcoming 24 September 2018 EGM

19. Enea has proposed a resolution at an upcoming extraordinary general meeting to express "*qualified consent to commence the Construction Stage of the Project Ostrołęka C*".⁴²
20. For the reasons expressed above, ClientEarth regards the proposed resolution, and the Management Board's proposal of that resolution, as clearly and obviously harmful to the interests of Enea and its shareholders and contrary to good customs. ClientEarth has therefore requested the Management Board to re-consider its proposal of the resolution.

Assurances and information sought

21. ClientEarth has sought the following assurances from Energa and Enea:
 - a. the basis of Energa's and Enea's assessment that the project will be profitable, the sensitivity analysis applied to that assessment, any independent advice upon which it rests and whether (and the extent to which) it relies upon capacity market payments and / or assumptions about a financing model that will not be in place until after December 2018;
 - b. that Energa's and Enea's Supervisory Boards will not consent to (and Energa and Enea will not) issue an NTP before :
 - i. the capacity market auction is held and won and until a determination is made that the contract secured is sufficient to ensure the project's profitability;
 - ii. third-party financing is secured and upon confirmation that the terms of such financing ensure the project's profitability to Energa and Enea (not simply the profitability of the project at the SPV level); and
 - c. the measures in place to avoid the proceeds of Energa's Eurobonds being applied to Ostrołęka C.
22. ClientEarth has reserved all of its rights and remedies.

⁴² Enea, Current Report No. 48/2018, 28 August 2018, <http://investors.enea.pl/en/pr/400432/draft-resolutions-of-the-extraordinary-general-meeting-of-enea-s-a-con>.

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ClientEarth is a charity that uses the power of the law to protect people and the planet. We are international lawyers, finding practical solutions for the world's biggest environmental challenges. We are fighting climate change, protecting oceans and wildlife, supporting sustainable forestry, greening energy, making business more responsible and pushing for government transparency. We believe the law is a tool for positive change. From our offices in London, Brussels, Warsaw, New York City and Beijing, we work on laws throughout their lifetime, from the earliest stages to implementation. And when those laws are broken, we go to court to enforce them.

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