

MEMORANDUM

To: Prof. Robert Eccles / UN Global Compact

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Legal Perspective on an Annual Board “Statement of Significant Audiences and Materiality” – Draft German Law Perspective

The information contained in this memorandum is based solely on the laws and regulations of the Federal Republic of Germany effective as of the date hereof and does not consider the laws or regulations of any other jurisdiction.

Setting the legal landscape

- 1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.**

German company law knows various different legal types of entities/companies which are governed specifically by different legal acts and codes. Basically, these are the limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*), governed by the German Limited Liability Companies Act (*GmbH-Gesetz*), the stock corporation (*Aktiengesellschaft, AG*), governed by the German Stock Corporation Act (*Aktiengesetz*), and the commercial partnership, governed by the German Commercial Code (*Handelsgesetzbuch*).

The duties of the legal representatives of a German company are generally and primarily owed to the company itself (and not to "a social role" of the company). However, the general view is that such concepts could be construed as to encompass not only a duty to the company itself (and its shareholders) but also to non-shareholders that could be impacted by the company's activities, such as, for example, the company's employees, third parties with business relationship with the company, the community in which the company's activities are carried out, the environment, and the society in general.

For more details, please refer to questions 7, 9, 10 and 11 below.

Regulatory Framework

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

Germany is a Federal Republic comprised of federal government and parliament, 16 states (each of them with its own government and parliament body) and various municipalities. Germany features a civil law system. Accordingly, and unlike the common law systems in which court decisions are a principal source of law, the German legal system is based upon codified law and not primarily upon judicial precedents.

All states of the Federal Republic as well as the federal government and parliament may issue laws within the limits established for each legislative authority by the Federal Constitution. The Federal Constitution provides that the Federal Government, the States, and the Municipalities cannot enact laws that are contrary to the Constitution and the laws issued by the Federal Government are superior to the laws issued by the states.

3. Are corporate/securities laws regulated federally/nationally, provincially or both?

Corporate and securities laws, monetary, fiscal, and trade policies are regulated and executed at the Federal level in Germany and are complemented by other laws, decrees, and regulations. Some national law derives from EU Directives which are transposed into domestic law and regulation.

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

The main government agency charged with regulating the corporate and securities laws in Germany is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*).

BaFin brings together under one roof the supervision of banks and financial services providers, insurance undertakings and securities trading. The objective of financial supervision is to ensure the proper functioning, stability, and integrity of the German financial market. It is an autonomous public-law institution and it is subject to the legal and technical supervision of the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*). It is funded by fees and contributions from the institutions and undertakings under its supervision.

At the state level, the Exchange Supervisory Authorities (*Börsenaufsichtsbehörden*) of the respective states are in charge of market and legal supervision of the stock exchanges. The Exchange Supervisory Office of the state of Hessen which supervises the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse, FWB*) serves as example. Apart from the Sanctions Committee and the Executive Management of the Frankfurt Stock Exchange, the Exchange Supervisory Office may impose sanctions on market participants. Its main tasks are (i) to supervise the price formation processes; (ii) to investigate violations of exchange regulations; and (iii) to develop preventive measures and supervise proper trading of the

exchange bodies. Its further tasks encompass: (i) the supervision of the market participants admitted to exchange trading and (ii) contributions to legislation and exchange policy.

5. Does the jurisdiction have a stock exchange(s)?

Germany currently has seven stock exchanges, located in Frankfurt am Main, Stuttgart, Hamburg, Hannover, Berlin, Düsseldorf, and Munich. The most important stock exchange is the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse, FWB*), which is one of the world's largest trading centres for securities. With a share in turnover of more than 85%, it is the largest of Germany's seven stock exchanges. The publicly listed stock corporation Deutsche Börse AG operates the Frankfurt Stock Exchange. In this capacity it ensures the functioning of exchange trading.

The Frankfurt Stock Exchange currently offers a broad range of more than 37,000 tradable securities, such as shares, bonds, and funds.

Incorporation and listing

6. Do the concepts of "limited liability" and "separate legal personality" exist?

The concepts of separate legal personality and limited liability do exist under German law and are applicable to various types of legal entities that may be incorporated in Germany, including the limited liability companies (*Gesellschaft mit beschränkter Haftung*) and the stock corporations (*Aktiengesellschaft*) which are the most commonly used legal entities in Germany. The limited liability company (known as a "GmbH") includes features common to corporations, but is otherwise similar to English private limited companies and other types of European limited liability companies. The stock corporation (normally referred to as an "AG") is similar to a corporation organized under state law in the United States and a public limited company in England.

Generally, the "separate legal personality" concept means that the companies have a legal personality (and assets) that is separate from their owners and shareholders. As a consequence, the assets of the company are not available for attachment by the personal creditors of the company's owners.

The "limited liability" concept means that the owners of the companies are not personally liable for the companies' debts. Therefore, limited liability protects the assets of the company's owners from attachment by the company's creditors.

Both in a stock corporation and a limited liability company the owners are liable up to the extent of their capital holdings, which means that after the capital stock is fully paid up the owners are not personally liable for the company's obligations and are not required to make any additional capital contribution, even if the company is insolvent. However, in a limited liability company, until the company's capital stock is fully paid up, owners are jointly and severally liable for the total amount of the unpaid capital.

Notwithstanding the existence of the concepts of "separate legal personality" and "limited liability" under German law, the corporate veil may be pierced, as to managing directors, members of the management board or supervisory board, and/or owners of a German entity if certain extraordinary conditions are met.

7. Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company's social or environmental impacts, or to respect its stakeholders?

No, such recognitions are not required and were also historically not required.

However, German companies have the possibility to commit to the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). The Code presents essential regulations for the management and supervision of German listed companies and contains, in the form of recommendations and suggestions, internationally and nationally acknowledged standards for good and responsible corporate governance.

Through the declaration of conformity pursuant to § 161 Stock Corporation Act (*Aktiengesetz*), the code has a legal basis. Accordingly, the recommendations and suggestions are not mandatory. However, deviations from the recommendations – not the suggestions – have to be explained and disclosed with the annual declaration of conformity ("Comply or Explain"). The recommendations and suggestions of the code become valid with the publication in the official section of the Federal Gazette (*Bundesanzeiger*).

§ 161 Stock Corporation Act (*Aktiengesetz*) applies only to stock corporations admitted to the regulated market of a German stock exchange, it does not apply to companies listed on the open market.

8. Do any stock exchanges have a responsible investment index, and is participation voluntary (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange's Socially Responsible Investment Index.)

Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse, FWB*) currently has several responsible investment indices, such as:

(i) ÖkoDAX

The ÖkoDAX tracks the performance of the 10 most liquid German companies from the Prime IG Renewable Energies Index, which represents the renewable energies sector. These companies are selected according to market capitalization and are equally weighed in the index portfolio. The composition of the index is reviewed quarterly.

(ii) DAXglobal Alternative Energy

The DAXglobal Alternative Energy is a growth indicator in the alternative energies sector. Companies aiming to be included in the DAXglobal Alternative Energy Index must generate the majority of their revenue in one of the five alternative energy areas: natural gas, solar, wind, ethanol, geothermal power/hydro, power/batteries.

(iii) DAXglobal Sarasin Sustainability Germany

This index lists companies with a sustainable strategy, such as environmental protection measures as well as economic stability and favourable conditions for employees, suppliers, and customers. The companies in this index are selected using the Sarasin Sustainability Matrix from the Swiss bank Sarasin. Analysis of environmental and social factors plays a key role in this two-dimensional assessment process. The matrix is based on the following components:

- Sector rating: comparative assessment of sectors based on selected environmental and social criteria
- Company rating: comparative environmental and social assessment of companies within a sector

(iv) Photovoltaik Global 30

ABN Amro Bank's Photovoltaik Global 30 Index tracks the performance of the 30 largest and most liquid companies in the global solar energy sector. Deutsche Börse calculates the index per minute each trading day as both a price and a performance index.

(v) Credit Suisse Global Alternative Energy

The Credit Suisse Global Alternative Energy Index provides a tradable indicator for the renewable energies market segment.

9. To who are directors' duties generally owed?

See Question 1, to the company.

The management structure of a company constituted under German law may vary depending on its corporate form. Generally, the same duties apply to the members of the company's management, although their liability may vary in certain cases.

The limited liability company (*Gesellschaft mit beschränkter Haftung*) is managed by one or more Managing Directors (*Geschäftsführer*) elected by the shareholders of the company. The managing directors are responsible for the conduct of the corporate business and for the representation of the company in dealings with third parties. Their powers may be limited by the articles of association. The establishment of a Supervisory Board for a limited liability

company is voluntary, but under certain legal acts on worker participation under certain conditions mandatory (see question 24).

The corporation (*Aktiengesellschaft*) is managed by: (i) a Management Board (*Vorstand*) with one or more members, a mandatory body which is responsible for the conduct of the corporate business and for the representation of the company in dealings with third parties and (ii) a Supervisory Board (*Aufsichtsrat*), a mandatory body created to appoint the members of the Management Board and to supervise the acts of the Management Board, with powers to issue opinions, request documents and information, review financial reports, and even call general shareholders' meetings under certain conditions.

The duties of the Managing Directors, the members of the Management Board, and the Supervisory Board of a German company are generally and primarily owed to the company itself (and not necessarily to its shareholders). This applies in particular with regard to the limited liability company while it is recognized for the stock corporation that the members of the Management Board are also obligated to public interests.

10. What are the duties owed by directors – please state briefly. Please indicate if there are express or implied duties to avoid damage to the company's reputation?

The German corporate law establishes specific duties applicable to the Managing Directors, the Management Board, and the Supervisory Board, such as:

Duty of care and due diligence

- Section 43 (1) of the German Limited Liabilities Act (*GmbH-Gesetz*) and Sections 93 (1) (ii), 116 of the German Stock Corporation Act (*Aktiengesetz*): The company's affairs shall be conducted with the due diligence of a prudent businessman (applicable to Managing Directors, Management Board Members, and Supervisory Board Members).
- Section 41 of the German Limited Liabilities Act and Section 91 of the German Stock Corporation Act: Proper bookkeeping for the company is obligatory.
- Section 246 German Commercial Code (*Handelsgesetzbuch*): Preparation of the annual financial statements.
- Section 92 (1) of the German Limited Liabilities Act and Section 49 (3) of the German Stock Corporation Act: A meeting must be convened without undue delay if it is clear from the annual financial statements or the balance sheet prepared in the course of the financial year that half of the share capital has been lost.
- Section 15a of the German Insolvency Act (*Insolvenzordnung*): File for insolvency on time (insolvency or excessive debt).

- Section 43 (3) of the German Limited Liabilities Act and Section 93 (3) of the German Stock Corporation Act: Monitor the rules regarding the capital maintenance.

Duty of loyalty

- Section 85 of the German Limited Liabilities Act and Section 93 (1), (3) of the German Stock Corporation Act: No disclosure of confidential information and secrets of the company towards third parties (Limited Liability Company) and/or shareholders (Stock Corporation).
- Section 88 of the German Stock Corporation Act (also applicable to Limited Liability Companies): Prohibition of competition.

There are no specific duties to avoid damage to the company's reputation. However, it is our understanding that such duties would be encompassed by the duty of due diligence, as provided for in Section 43 of the German Limited Liabilities Act and Section 93 of the German Stock Corporation Act.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006, and in particular, ss.(1))?

First, it is important to highlight that German law does not provide for such a detailed rule as Section 172 of the UK Companies Act 2006.

However, section 87 (1) (ii) of the German Stock Corporation Act states with respect to the remuneration of the members of the Management Board: The remuneration system of listed companies shall be aimed at the company's sustainable development. Thus, the concepts of corporate sustainability and corporate social responsibility are only a vague part of German corporate law.

The non-binding German Sustainability Code (*Deutscher Nachhaltigkeitskodex*) specifies Key Performance Indicators (27 key performance indicators [KPIs] of Global Reporting Initiative [GRI] or 19 of the European Federation of Financial Analyst Societies [EFFAS]) complementary to 20 Code criteria, describing the core of entrepreneurial sustainability. In the declaration of conformity, companies report on whether they comply with the requirements of the Code or outline the reasons for deviating from them ("comply or explain"). The Sustainability Code is a transparency instrument which can be used by organizations and companies of varying sizes: large and small, public and private enterprises, with or without current sustainability reporting procedures, capital-market-oriented companies and those wishing to inform stakeholders about their corporate sustainability performance.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts? What, additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

Please refer to question 11 above.

There are no rules establishing the extent of the directors' (Managing Directors, Management Board, and Supervisory Board) discretion in determining how to balance the different factors within his/her/their duty.

13. What are the legal consequences for failing to fulfil any duties described above; and who may take action to initiate them? What defenses are available? Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

The director/management board member/supervisory board member of a German company shall be held liable for damages or losses incurred by the company as a result of acts within their duties, performed with negligence or intention.

However, the director/management board member/supervisory board member shall not be deemed to have violated their duties if, at the time the entrepreneurial decision was taken, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company (Section 93 (1) (2) of the German Stock Corporation Act, this so-called Business Judgment Rule is also applicable to Limited Liability Companies).

In the event of any director/management board member/supervisory board member being held liable as mentioned above, the company may file a lawsuit against such a person for the losses and damages incurred by the company.

14. Are there any other directors' duties which are relevant to the interests of stakeholders?

There are no other duties that could be material for the interest of the stakeholders of the company.

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures. What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

The structure of two tier boards exists in Germany. Please refer to questions 9, 10, and 13 for more details. The duties which are applicable to the senior management who are not board members are mainly determined by employment contract. Section 611 of the German Civil Code (*Bürgerliches Gesetzbuch*) only states the typical contractual duties in an employment contract which is a special type of a service contract: By means of a service

contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration.

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary. Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

There are both mandatory and voluntary disclosures of information by companies in Germany.

Stock corporations and limited liability companies are generally required to do financial reporting by filing with the Federal Gazette (*Bundesanzeiger*) their annual financial statement, including the situation report, the report of the supervisory board, the declaration in accordance with section 161 of the German Stock Corporation Act (cf. question 7), and the proposed distribution of the profits (Section 325 (1) of the German Commercial Code). The situation report of large companies must also contain nonfinancial performance indicators such as information regarding environment and employee issues (Section 289 (3) and Section 315 (1) of the German Commercial Code). Apart from that, there are no mandatory reporting requirements.

However, the non-binding German Sustainability Code (*Deutscher Nachhaltigkeitskodex*) inter alia requests information on political aspects such as donations to governments, political parties or politicians, membership payments, lobbying activities, and influence on legislative procedures.

The European Union has adopted recently a Directive on Reporting (EU CSR-Reporting-Directive) on nonfinancial factors and diversity. This Directive will now have to be transposed into national law.

17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

The reporting obligations imposed on companies and described in question 16 above, especially those applicable to publicly-held companies, are mainly related to information deemed material to the companies themselves and/or their investors/creditors, and may include information on subsidiaries, suppliers, and other business partners in a jurisdiction outside of Germany if the materiality threshold is met.

The new EU-CSR-Reporting-Directive will extend the reporting requirement to the supply chain.

18. Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?

Annual financial statements of companies generally have to be verified by auditing firms (such as KPMG or Ernst & Young). However, if the company is a so-called small company in terms of Section 267 (1) of the Commercial Code (*Handelsgesetzbuch*) there is no obligation to have the financial statements audited. All financial statements (regardless of being audited or not) have to be published on the internet database of the Federal Gazette (*Bundesanzeiger*, www.bundesanzeiger.de) by the end of the following year (Sections 316 and 325 of the Commercial Code (*Handelsgesetzbuch*)). This database is open to the public and free of charge, so everybody has access to the financial statements. Failure to comply with this obligation will trigger fines (Sections 334 and 335 of the Commercial Code (*Handelsgesetzbuch*)), which will be imposed by the Federal Office of Justice (*Bundesamt für Justiz*).

This picture may change when the new EU CSR-Reporting-Directive is implemented into German law.

19. What is the external assurance regime for reporting on a company's impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance. Please summarise any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

There is no specific external assurance regime for reporting on companies' impacts on stakeholders besides the regulations explained in question 16 (see question 18 for sanctions in case of failure to comply).

Stakeholder engagement

20. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?

There are no restrictions on circulating shareholder proposals.

21. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard? How does the legal duty of the fund align with term and contractual performance criteria of fund managers - does this facilitate or deter consideration of such impacts?

There is no legal requirement in Germany requiring institutional investors to consider impacts on non-shareholders in their investment decisions.

However, institutional investors may voluntarily opt to do so to comply with best governance practices and improve their reputation and image, for example by becoming signatories of the Principles for Responsible Investment to implement environmental, social, and governance factors into investors' decision making process, and of the Carbon Disclosure Project, related to global warming.

22. Can non-shareholders address companies' annual general meeting? What is the minimum shareholding required for a shareholder to raise a question at a company's AGM?

Only shareholders (or their legal representatives) may attend a general shareholders' meeting, as the general shareholders' meeting is not a public event. Third parties are therefore generally excluded unless stated otherwise in the statutes of the company. However, members of certain government supervision authorities have a right to attend.

If stipulated in the statutes of the company, shareholders may attend and vote at general meetings remotely (i.e., not being physically present, for example through the internet).

There is no minimum shareholding required to raise questions at the general shareholders' meeting; however, the Management Board (*Vorstand*) may refuse to answer the question under certain circumstances.

23. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

As described in question 11 above, the non-binding German Sustainability Code (*Deutscher Nachhaltigkeitskodex*), which is aimed at all German companies, corporations, and organizations may influence contractual relationships by taking environmental and social aspects into account. The usual guidelines of the UN Global Compact, the Organisation for Economic Co-operation and Development, the Equator Principles etc. can be applied in Germany as well. Depending on the wording of the contractual terms they can conflict with national law and be void.

24. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

Employees of corporations need to be represented in the Supervisory Board (*Aufsichtsrat*) with one-third, if the corporation has on average more than 500 employees (One-Third Participation Act, *Drittelbeteiligungsgesetz*). If the corporation has on average more than 2000 employees, half of the members of the Supervisory Board (*Aufsichtsrat*) have to be employees (Co-determination Act, *Mitbestimmungsgesetz*). Employees may also vote employee councils (*Betriebsrat*), if there are at least five employees (Works Council Constitution Act, *Betriebsverfassungsgesetz*). Employee councils are not members of company boards or the management, but have authority to discuss and review certain issues with the management on a regular basis for the sake of the employees and the company as a whole.

Other than that there are no other stakeholders represented at the management level.

25. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

There are no specific laws in Germany requiring gender, racial/ethnic, religious, or other stakeholder representation on company boards. However, the federal government is currently planning to implement a gender quota which will oblige German listed companies from 2016 to staff their Supervisory Boards (*Aufsichtsrat*) with at least 30% women.

From a broader perspective, Article 3 of the Federal Constitution claims equality of all persons and equal rights for men and women and prohibits discrimination because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions, or disability. This notion has been substantiated in the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), which prohibits discrimination in (public and private) employee relationships and in civil law in general. It stipulates claims for damages under certain circumstances and the existence of a federal anti-discrimination authority.

The Corporate Governance Code contains recommendations regarding diversity and the representation of women.

26. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholders groups? Are there any serious proposals to impose such responsibility?

Germany does not provide any specific regulations covering liability of a parent company with regard to the impacts that one of its subsidiaries has had on stakeholders' groups.

However, Sections 311 and 317 of the Stock Corporation Act (*Aktiengesetz*) stipulate that the parent company must not induce the subsidiary to conduct business activities that are disadvantageous to the subsidiary, unless the parent company compensates for the damage. Otherwise, the parent company is liable for damages caused to the subsidiary and other shareholders. The executives of the parent company responsible for this malfeasance are liable the same way.

In case the parent company and the subsidiary have concluded a controlling agreement and the parent company gives instructions or orders to the management of the subsidiary, the executives of the parent company giving the orders are liable for any damages incurred by the subsidiary as a consequence of these orders, if the orders were not given with the due diligence of a prudent businessman (Section 309 of the Stock Corporation Act (*Aktiengesetz*)). These damages can be claimed by the subsidiary, any shareholder, or even a third party who is a creditor of the subsidiary on behalf of the subsidiary.

27. Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

We are not aware of any incoming law or proposals that are relevant to the matters discussed in this Memorandum other than the gender quota mentioned in question 25.

The EU-CSR-Reporting Directive will have to be transposed into German law. The discussions within the competent Ministry of Justice have only started. The discussions on the National Action Plan on Business and Human Rights have been kicked off in November 2014. It is expected that the procedure should be finalized within two years.

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