

39 from 39, Series 3 Episode 2: The UK / EU Trade and Cooperation Agreement – Environment and Energy

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Stephen Tromans QC

Ruth Keating

Gethin Thomas

Introduction

- The 11th hour deal on Christmas Eve
- Provisionally in force from 1 January 2021
- But still to be ratified by European Parliament and Council (April)
- To be read with the Withdrawal Agreement and NI Protocol
- The European Union (Future Relationships) Act 2021 (EUFRA)



Background

- “ ... the first negotiation in history where both parties started off with free trade and discussed what barriers to erect” (Pascal Lamy, former WTO Head)
- Tariff free trade but not frictionless
- The Government’s approach: Canada and Cakeism
- The EU approach – no market access while undercutting EU economic model



What the EU says

- The Agreement concluded between the EU and the UK sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in EU programmes.
- It is underpinned by provisions ensuring a level playing field and respect for fundamental rights.
- While it will by no means match the level of economic integration that existed while the UK was an EU Member State, the Trade and Cooperation Agreement goes beyond traditional free trade agreements and provides a solid basis for preserving our longstanding friendship and cooperation

The Outcome

- Part 1: Common and Institutional Provisions
- Part 2: Trade, Transport, Fisheries
 - Heading 1 (Trade) includes:
 - Title VIII: Energy
 - Title XI: Level Playing Field Provisions
 - Heading 2: Aviation
 - Heading 5: Fisheries
- Part 3: Law Enforcement and Judicial Cooperation
- Part 4: Thematic Cooperation (Health Security and Cyber)
- Part 5: Participation in EU Programmes
- Part 6: Dispute Settlement and Horizontal Provisions

Today's content

- Level Playing Field: Ruth and Stephen
- Energy: Gethin
- Enforcement in outline: Stephen

Future sector-specific events – 15 March and 15 April

Please use Q&A function as we speak

Title XI: Level Playing Field Provisions



Chapter 1 – general provisions

“Article 1.1: Principles and objectives

...

2. The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promote the development of international trade and investment in a way that contributes to the objective of sustainable development.

3. Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050.

4. The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title.” (Emphasis added.)

Chapter 3 – subsidy control

“Article 3.5 Prohibited subsidies and subsidies subject to conditions

...

Energy and environment

14. The Parties recognise the importance of a secure, affordable and sustainable energy system and environmental sustainability, notably in relation to the fight against climate change which represent an existential threat to humanity. Therefore, without prejudice to Article 3.4 [Principles], the subsidies in relation to energy and environment shall be aimed at, and incentivise the beneficiary in, delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy. Such subsidies shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of the relevant Party.

Subsidies to air carriers for the operation of routes

15. Subsidies shall not be granted to an air carrier for the operation of routes except: (a) where there is a public service obligation, in accordance with Article 3.3 [Services of public economic interest]; (b) in special cases where this funding provides benefits for society at large; or (c) as start-up subsidies for opening new routes to regional airports providing that it increases the mobility of citizens and stimulates regional development.”

Chapter seven – environment and climate

- Article 7.1: Definitions
- Article 7.2: Non-regression from levels of protection.
- Article 7.3: Carbon pricing
- Article 7.4: Environmental and climate principles
- Article 7.5: Enforcement
- Article 7.6: Cooperation on monitoring and enforcement
- Article 7.7: Dispute settlement

Article 7.1

Article 7.1.1

“Environmental levels of protection” is defined to mean the levels of protection provided overall in a party’s law which have the purpose of protecting the environment, including the prevention of a danger to human life or health from environmental impacts, including in each of the following areas:

- Industrial emissions.
- Air emissions and air quality.
- Nature and biodiversity conservation.
- Waste management.
- The protection and preservation of the aquatic environment.
- The protection and preservation of the marine environment.
- The prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release or disposal of chemical substances.
- The management of impacts on the environment from agricultural or food production, notably through the use of antibiotics and decontaminants.

Article 7.1.2

For the EU, only environmental levels of protection that are common to all member states are in scope.

Article 7.2

Article 7.2: Non-regression from levels of protection

“1. The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the environmental levels of protection and climate level of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter.

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.

3. The Parties recognise that each Party retains the right to exercise reasonable discretion and to make bona fide decisions regarding the allocation of environmental enforcement resources with respect to other environmental law and climate policies determined to have higher priorities...” (Emphasis added.)

Article 7.3

- Carbon pricing

“1. Each Party shall have in place an effective system of carbon pricing as of 1 January 2021.

...

5. Each Party shall maintain their system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level of protection provided for by Article 7.2 [Non-regression from levels of protection]

6. The Parties shall cooperate on carbon pricing. They shall give serious consideration to linking their respective carbon pricing systems in a way that preserves the integrity of these systems and provides for the possibility to increase their effectiveness.” (Emphasis added.)

Articles 7.4 – environmental and climate principles

- Internationally recognised environmental principles.
- The principle that environmental protection should be integrated into the making of policies, including through impact assessments.
- The principle of preventative action to avert environmental damage.
- The precautionary approach.
- The principle that environmental damage should as a priority be rectified at source.
- The polluter pays principle.

Chapter eight – other instruments for trade and sustainable development

- Article 8.1: Context and objectives
- Article 8.4: Multilateral environmental agreements
- Article 8.5: Trade and climate change
- Article 8.6: Trade and biological diversity
- Article 8.7: Trade and forests
- Article 8.9: Trade and investment favouring sustainable development

LPF – some practical issues

- Not binding on individuals or enforceable in domestic courts: see Article COMPROV.16
- Some aspects are subject of domestic law under EUFRA 2021, e.g. new power under s. 166A Customs & Excise Management Act 1979 to make regulations for the purpose of monitoring, or controlling, the movement of goods that pose, or might pose, a risk to — (a) public health or public safety, (b) national security, or (c) the environment (including the health of animals or plants). Also general power of implementing regulations under section 31
- Note s. 29(1) EUFRA: “Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the [TCA] or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

Barriers to trade



- Zero tariffs and quotas, provided rules of origin complied with.
- The Agreement will prevent unnecessary technical barriers to trade, for example by providing for self-declaration of regulatory compliance for low-risk products and facilitations for other specific products of mutual interest, such as automotive, wine, organics, pharmaceuticals and chemicals.
- However, all UK goods entering the EU will still have to meet the EU's high regulatory standards, including on food safety (e.g. sanitary and phytosanitary standards) and product safety.

No comparison with CETA



- CETA is a fully fledged trade and investment treaty
- It has comprehensive provisions on the environment – see e.g. Chapter 24, Article 24.5
 1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.
 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
 3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively force its environmental law to encourage trade or investment.
- See also Article 24.6 on access to remedies and procedural guarantees

Non-regression



- Article 7.2: “A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transitional period, including by failing to effectively enforce its environmental law or climate level of protection”
- The underlined words are key.
- Demonstrating an effect on trade or investment between the Parties may be far from straightforward

Examples

- Weakening of air quality or water standards – does this affect trade?
- What if the effect is to reduce burden on UK agriculture relative to EU farmers?
- What about changes to BAT for competing industrial sectors?
- What about reduced regulatory controls on Freeports giving UK port operators an advantage?
- What if controls are relaxed to attract investment from say US or China – does this affect investment between the Parties?



Link to Environment Bill?

- OEP has jurisdiction in respect of “environmental law”, currently defined by section 45 as “any legislative provision to the extent that it— (a) is mainly concerned with environmental protection, and (b) is not concerned with an excluded matter.”
- The TCA is therefore not “environmental law” – should it be?
- What would be the implications?

Environment

A new Office for Environmental Protection, and our own legal targets, including for air quality.

Manifesto 2019



Vote Conservative



Background (1): Energy in the EU

Treaty on the Functioning of the European Union

TITLE XXI

ENERGY

Article 194

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

Background (1): Energy in the EU

- The 'fully integrated internal energy market' (February 2015).
- 2020 report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action (October 2020)



Background (1): Energy in the EU

‘The UK energy sector has extensive links with the EU through trade, directives and interconnection. Successive UK Governments have championed the liberalisation and decarbonisation agendas within the EU, including the development of the single market in energy. A larger, harmonised energy market with fewer trade barriers should in theory promote competition, reduce consumer prices, and increase security of supply.’ (para 72)

‘Stakeholders are in favour of continued UK access to the Internal Energy Market (IEM). In deciding the nature of the UK’s future relationship with the market, the Government will need to weigh the costs of associated legislation and regulation against the economic, security of supply and carbon reduction benefits afforded by IEM membership.’ (para 99)



Background (2): Energy policy in the UK



Overview of energy provisions in the Trade and Cooperation Agreement

- Competition in electricity and gas markets, and market abuse (articles 5-12)
- Trading over interconnectors (articles 13-15)
- Network development and security of supply (articles 16-18)
- Technical operation (articles 19-20)
- Safe and sustainable energy (articles 21-26)
- Energy goods and raw materials (articles 27-30)
- Annexes ENER-1 to 4

Overview of energy provisions in the Trade and Cooperation Agreement

74. The energy provisions support and strengthen the UK and the EU's respective energy and climate ambitions. This includes the way in which the parties trade electricity and gas over interconnectors, work together on security of supply, integrate renewables into our respective markets and cooperate to develop opportunities in the North Sea.

75. The Agreement commits both Parties to develop and implement new, efficient trading arrangements by April 2022. These will ensure that capacity on the interconnectors is maximised and that there is implicit trading in how this capacity is allocated (i.e. capacity and electricity are sold together). This will benefit UK consumers and help integrate renewables and other clean technologies onto the grid in line with our domestic commitment to net zero emissions. Whilst this system is being implemented, alternative trading arrangements will be in place for electricity. We have also agreed arrangements that will ensure we continue to trade gas efficiently via the PRISMA platform.

76. The UK and EU have agreed to enhance our cooperation on renewable energy, including in the North Sea. This will facilitate the development of hybrid projects that combine interconnectors and offshore windfarms, and opens up the potential for a North Sea grid. This will help realise the region's huge potential, enabling renewable energy to continue to power our homes and businesses in the future.

77. The Agreement provides for a new set of arrangements for extensive technical cooperation between the respective regulators and system operators, particularly with regard to security of supply, market abuse and network development.

78. The Agreement supports trade and investment in energy goods and raw materials between the UK and EU.

Principles

Article ENER.4: Principles

Each Party preserves the right to adopt, maintain and enforce measures necessary to pursue legitimate public policy objectives, such as securing the supply of energy goods and raw materials, protecting society, the environment, including fighting against climate change, public health and consumers and promoting security and safety, consistent with the provisions of this Agreement.

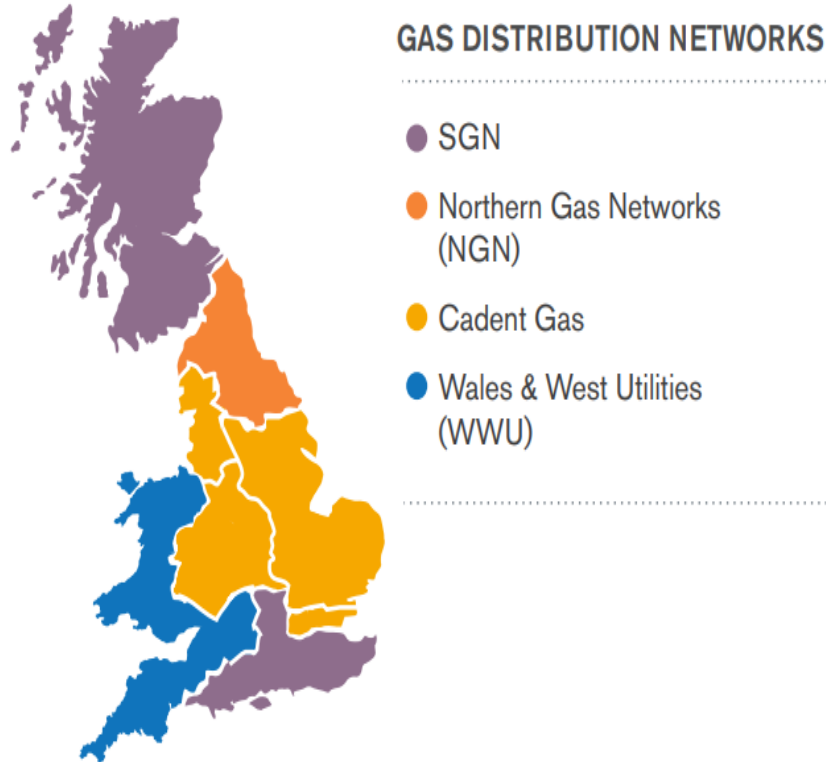


Competition in electricity and gas markets

- Article ENER.5: Competition in markets and non-discrimination:
 - *Each Party shall ensure that its regulatory framework for the production, generation, transmission, distribution or supply of electricity or natural gas is non-discriminatory with regard to rules, fees and treatment*
- Article ENER.6: Provisions relating to wholesale electricity and gas markets
 - *Each party shall ensure that wholesale electricity and natural gas prices reflect actual supply and demand.*
- Article ENER.7: Prohibition of market abuse on wholesale electricity and gas markets
 - *Each party shall prohibit market manipulation and insider trading on wholesale electricity and natural gas markets. Each Party shall monitor trading activity on these markets with a view to detecting and preventing trading based on inside information and market manipulation...*
- Article ENER.8: Third-party access to transmission and distribution networks



Competition in electricity and gas markets



- Article ENER.9: System operation and unbundling of transmission network operators
 - *Each Party shall ensure that transmission system operators carry out their functions in a transparent, non-discriminatory way*
 - *Each Party shall implement arrangements for transmission system operators which are effective in removing any conflicts of interest arising as a result of the same person exercising control over a transmission system operator and a producer or supplier.*
- Article ENER.10: Public policy objectives for third-party access and ownership unbundling
- Article ENER.11: Existing exemptions for interconnectors
- Article ENER.12: Independent regulatory authority

Energy and environmental subsidies

- Annex ENER-2: Subsidies for the decarbonisation of emissions linked to own industrial activities shall achieve an overall reduction in greenhouse gas emissions. The subsidies shall reduce the emissions directly resulting from the industrial activity. Subsidies for improvements of the energy efficiency of own industrial activities shall improve energy efficiency by reducing energy consumption, either directly or per unit of production.

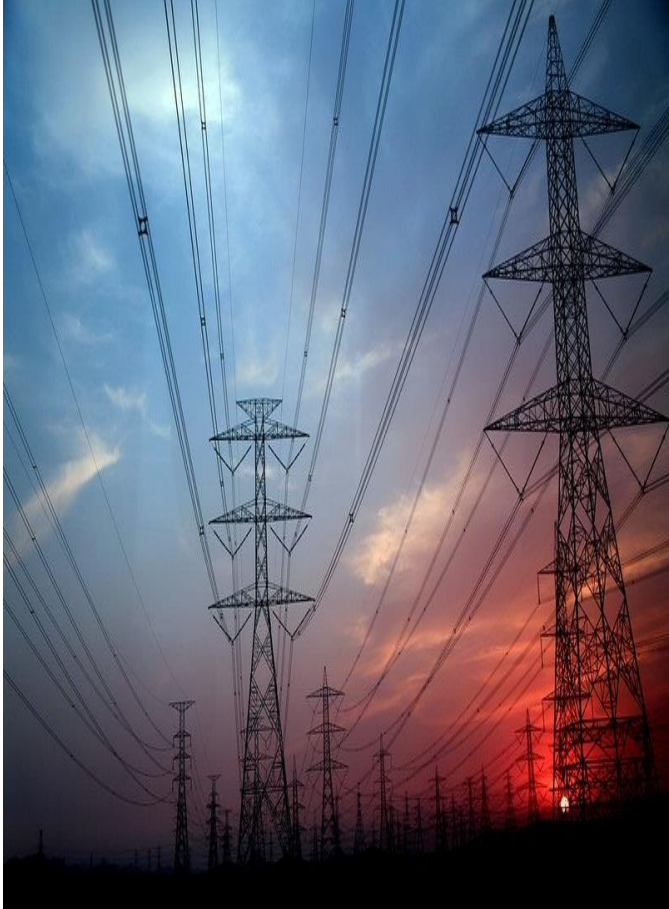


Trading over interconnectors

- Article 13 imposes a number of high level obligations on both the UK and EU with the aim of ensuring the efficient use of electricity interconnectors and reducing barriers to trade.
- Article 14 makes provision for ensuring electricity trading arrangements at all timeframes.
- Article 15 makes provision to aim to ensure the efficient use of gas interconnectors and reducing barriers to trade between the Union and the United Kingdom.



Network development and security of supply



- Article 16 requires the party to cooperate to facilitate the timely development and interoperability of energy infrastructure connecting their territories. Each Party shall ensure that network development plans for electricity and gas transmission systems are drawn up, published and regularly updated.
- Article 17 requires the Parties shall cooperate with respect to the security of supply of electricity and natural gas
- Articles 18 obliges both parties to assess risks affecting the security of supply of electricity or natural gas, including the likelihood and impact of such risks, and including cross-border risks.

Network development and security of supply

- Article 16 requires the party to cooperate to facilitate the timely development and interoperability of energy infrastructure connecting their territories. Each Party shall ensure that network development plans for electricity and gas transmission systems are drawn up, published and regularly updated.
- Article 17 requires the Parties shall cooperate with respect to the security of supply of electricity and natural gas
- Articles 18 obliges both parties to assess risks affecting the security of supply of electricity or natural gas, including the likelihood and impact of such risks, and including cross-border risks.

Technical operation

- Articles 19-20 makes provision for technical operation.

Safe and sustainable energy

- Under Article 22, each Party shall ensure that support for electricity from renewable sources facilitates the integration of electricity from renewable sources in the electricity market. Biofuels, bioliquids and biomass shall only be supported as renewable energy if they meet robust criteria for sustainability and greenhouse gas emissions saving, which are subject to verification.
- Article 23 requires the parties to cooperate in the development of offshore renewable energy by sharing best practices and, where appropriate, by facilitating the development of specific projects.



Safe and sustainable energy

- Article 24 requires parties to cooperate and exchange information with the aim of maintaining high levels of safety and environmental protection for all offshore oil and gas operations. The Parties shall take appropriate measures to prevent major accidents from offshore oil and gas operations and to limit the consequences of such accidents.
- Article 25 requires the promotion of cooperation between regulators and standardisation bodies to facilitate the development of international standards on energy efficiency and renewable energy.
- Article 26 requires the Parties shall promote research, development and innovation in the areas of energy efficiency and renewable energy.



Energy goods and raw materials

- Co-operation on safety and environmental protection (Article 24)
- If a Party decides to regulate the price of the domestic supply to consumers of electricity or natural gas, it may do so only to achieve a public policy objective, and only by imposing a regulated price that is clearly defined, transparent, non-discriminatory and proportionate. (Under Article 28)
- Procedural obligations on granting authorisations for exploration and production (Article 29)

Enforcement - institutions

- Partnership Council, co-chaired, meeting yearly at least, assisted by ...
- Trade Partnership Committee
- Trade Partnership Sub-Committees on e.g. goods, services, procurement, regulatory cooperation, level playing field
- Committees on
 - Energy
 - Air transport
 - Aviation safety
 - Road Transport
 - Social Security Coordination
 - Fisheries
 - Law Enforcement and Judicial Cooperation
 - Union Programmes

Partnership Council

- Decisions by mutual consent of co-chairs
- Non-binding recommendations to Parties
- Forum to resolve disputes at political level
- Adopts lists of arbitrators (INST.27)
- Commission represents the EU
- Commission committed to high level of transparency and sincere cooperation
- European Parliament to be immediately and fully informed

Dispute Resolution

- Dispute – one month of consultation
- Arbitration Tribunal – 6 months
- Tribunal Ruling – infringing party to comply within reasonable period of time (up to 40 days to determine what is reasonable)
- Complaining Party may request Tribunal to rule on compliance (45 days)
- Persisting lack of compliance – either temporary compensation agreed between the Parties, or unilateral suspension of obligations by Complaining Party in any area (e.g. trade tariffs, air traffic rights, access to fisheries waters)
- Arbitration Tribunal resolves disputes on suspension

Panel of Experts

- Dispute settlement mechanism for some areas: climate neutrality, labour and social standards, environment and climate, other instruments for sustainable development
- 90 day consultation with Domestic Advisory Groups (balanced representation of civil society)
- Reference to Panel of Experts (7 months)
- Respondent Party to inform DAGs and other Parties of measures taken in response to Panel Report
- Complaining Party may ask Expert Panel to rule on persisting lack of compliance (45 days for ruling)
- Persisting lack of compliance – either temporary compensation agreed between the Parties, or unilateral suspension of obligations by Complaining Party in any area (e.g. trade tariffs, air traffic rights, access to fisheries waters)
- Expert Panel resolves disputes on suspension

Remedial, Rebalancing and Compensatory Measures

- Intended to complement dispute resolution
- Set of measures available to each Party (listed in Article 3 of EU Council signing Decision)
- Examples: Subsidies, Fisheries, Rebalancing Measures in areas of environmental and climate protection, with material impact on trade or investment between UK and EU“
- “Appropriate” measures restricted in scope and duration to what is strictly necessary in order to remedy the situation
- Priority given to those measures which will least disturb the functioning of the Agreement
- Dispute may be referred to Arbitration Tribunal including 30 day expedited procedure. After 30 days other Party may apply proportionate Countermeasures until delivery of ruling

Thank you for attending

Slide pack will be available on 39 Essex website shortly

Coming up on 15th March:

Webinar:

Trade and Cooperation Agreement – Specific Provisions

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- <https://www.39essex.com/category/webinars/>
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Thank you for listening!

Stephen Tromans QC

stephen.tromans@39essex.com

Ruth Keating

ruth.keating@39essex.com

Gethin Thomas

gethin.thomas@39essex.com

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