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LEGISLATIVE DRAFTING IN THE UNITED KINGDOM

Workshop

"Different Approaches to Legislative Drafting in the EU Member States"

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Workshop Paper

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Legislative Drafting in the United Kingdom

1. What are the distinctive features of the legislative process?

1.1 Introduction

There are three major distinctive features generally found in the legislative process in common law jurisdictions which particularly impact on legislative drafting.

First, a distinction is drawn between the functions of formulating a policy and drafting primary legislation to implement the policy.

Secondly, there is a strong tradition of quite rigorous detailed parliamentary consideration of the legislative text during the enactment process.

Thirdly, there is an emphasis on not only legislation but also judicial decisions as important sources of law. Judicial decisions may be the basis of significant areas of law, either solely or in conjunction with subsequent legislation. Judicial decisions are also often an important, although not necessarily exclusive¹, legal basis for the general principles applied in the interpretation of legislation, and they determine the interpretation of specific legislative provisions.

1.2 Formulating Policy and Drafting Legislation

The formulation of policy in common law jurisdictions has much in common with that in civil law jurisdictions.

Government policy is normally formulated within the responsible ministry. The impetus for this may be research and analysis within the ministry, or commissioned by the ministry from outside public or private sector sources, or independent research and analysis which is brought to the attention of the ministry, or a combination of these.

A common feature of modern policy development is an impact assessment of the proposed policy and implementing legislation. Such assessment should embrace not only a cost/benefit analysis but also an evaluation of the regulatory impact of the policy and related legislation, and thus its indirect economic consequences. Impact assessment is both a continuous process to help the policy-maker fully evaluate and understand the consequences of possible and actual government intervention and a tool to enable the government to weigh and present the relevant evidence on the positive and negative effects of such intervention, which includes reviewing the impact of policies after they have been implemented. It may also be used of course to determine the impact of existing legislation preparatory to considering revising it. In that sense, it can be treated as a continuum within government².

¹ Common law jurisdictions often enact legislation which contains, amongst other matters, general rules for the interpretation of legislation: see, for instance, the (UK) Interpretation Act 1978; and other legislation may contain provisions on the construction and interpretation of its provisions.

² For an example of recommended procedures in conducting impact assessment, see the UK Government *Impact Assessment Guidance* (<http://www.berr.gov.uk/files/file44544.pdf>).

Example 1: Cost Benefit Analysis and Football Hooliganism

The Football (Offences and Disorder) Act 1999 was one of a series of statutes to control football hooliganism in England and Wales, and amongst supporters of English and Welsh teams playing abroad. The cost benefit analysis of the legislation suggested: (i) additional but marginal costs for the police in investigating new offences created by the legislation (but discounting marginal costs here and elsewhere is cumulatively an analytical weakness); (ii) additional but marginal costs for the prosecution service and the courts as a result of new offences created by the legislation (but failed to take account of defence costs which would mainly fall on the state); (iii) additional reporting requirements placed by the legislation on those previously convicted of similar offences would create additional manpower costs from an estimated required 5 new posts) on the agency regulating this reporting.

The importance of consultation, which may be seen as another aspect of impact assessment, is now also widely recognised. Consultation is commonly undertaken in accordance with a centrally standardised procedure which, for example, may set criteria for determining the scope of consultation, a recommended timetable for submissions, and consideration and response to the submissions³. Increasingly, at least the initial stages of such consultation are conducted electronically.

Example 2: UK legislation on human fertilisation and embryology

Following the birth of Louise Brown in England in 1978, the first baby to be conceived by in vitro fertilisation, the UK Government appointed a committee of enquiry to examine the social, legal and ethical implications of this and related procedures which reported in 1984. Its report (Cm. 9314) led to the enactment of the Human Fertilisation and Embryology Act 1990. In 2004, the UK Government announced a review of the 1990 Act in the light of further scientific developments. This review involved wide public consultation in 2005, and the publication of results of the review in 2006 (Cm. 6989) with the Government's policy proposals. This eventually resulted in the enactment of the Human Fertilisation and Embryology Act 2008.

The pattern in many common law jurisdictions is that once the policy has been determined within the ministry which requires implementing legislation, lawyers within the ministry prepare detailed instructions for the legislation to be drafted by lawyers who specialise in legislative drafting in an institutionally distinct part of government.

Ideally, the instructions from a ministry should contain a clear detailed account of the policy which is to be implemented by the legislation, existing legislation which relates to this and similarly any relevant judicial decisions. The quality of the instructions is an important consideration in drafting effective legislation. Consequently, it is not uncommon for the drafters to produce advice on what should be included in the instructions⁴, and in some cases they provide short training courses on this for administrators and lawyers in the instructing ministries.

³ See for example the revised UK Government *Code of Practice on Consultation* prepared by the Better Regulation Executive within the Department of Business, Enterprise and Regulatory Reform, and published in July 2008 (<http://www.berr.gov.uk/files/file47158.pdf>).

⁴ See, for instance, the paper produced by the UK Office of Parliamentary Counsel, *Working with Parliamentary Counsel* (http://www.cabinetoffice.gov.uk/media/190079/working_with_pc_guide.pdf)

2. Who drafts the legislation?

2.1 In the UK, for much of the Government primary legislation⁵ this is undertaken by the Office of Parliamentary Counsel (OPC), which is formally within the Cabinet Office. The OPC also drafts government amendments to the legislation which are introduced during the parliamentary process. In addition, when instructed to do so, it drafts some secondary legislation, and reviews secondary legislation which amends primary legislation to ensure the consistency of primary legislation. However, this division between the formulation of policy and the drafting of implementing legislation can be over-emphasised, as once the instructions have been received there is, for obvious practical reasons, liaison between the instructing ministry and the lawyers in the OPC drafting the legislation, with the ministerial committee of the Cabinet that considers draft Government legislation and, after the draft legislation is introduced into Parliament, with officials of the Parliament on procedural matters.

2.2 There are seen to be advantages in Government primary legislation being exclusively⁶ drafted within an office independent of the ministry instructing the legislation, in contrast to the usual institutional pattern in civil law jurisdictions where the legislation is drafted within the promoting ministry, with commonly one ministry (often the Ministry of Justice) having a supervisory role.

First, it allows for a fresh independent assessment of the proposed legislation by lawyers who have not been directly involved in the policy development process within the ministry. This may involve, as well as offering technical solutions offered for effective legislative implementation of policy, an independent assessment of the constitutional appropriateness of provisions within the proposed legislation⁷. In any event, this fresh independent assessment may reveal weaknesses in the proposed legislation, including whether new legislative powers are needed as they replicate existing powers, as well as in the practicalities of implementing and enforcing the legislation.

Example 3: OPC assessment identifying a technical weakness

A lawyer within the OPC recounted:

“In the 1990s I drafted the legislation establishing landfill tax. One problem was to define a disposal by way of landfill. I was asked to follow some regulations which defined waste disposal operations. When I looked at the items I saw that one of them was (in effect) “tipping (for example landfill)”. I said that we could not use this as part of a *definition* of landfill, because it referred to the very thing we were trying to define.”

⁵ As the UK is a quasi-federal state, there are similar units for drafting legislation to be introduced into the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly within their respective devolved legislative competences; legislation which applies those parts of the United Kingdom on matters which remain within the legislative competence of the UK Parliament are drafted within the Office of Parliamentary Counsel.

⁶ In the UK there are some very limited exceptions to this exclusivity. There was also a brief experiment in the 1990s of contracting out the drafting of elements of legislation to the private sector, which was widely regarded as unsuccessful as it resulted in errors and inconsistency: see Bates, “Contracting out drafting: a British experience” [1996] *Statute Law Review* 152.

⁷ This is reinforced by the fact that the head of the OPC, the First Parliamentary Counsel, formally has, if it is necessary, a right of direct access to the Prime Minister to indicate any concerns over such an issue.

Secondly, the size, manner of working and collegiality of the OPC, tends to facilitate a consistency of drafting style⁸.

The OPC has currently 61 drafters, although only about 85% of them are engaged in drafting legislation for the Government's immediate legislative programme⁹. The drafters are traditionally recruited after some years in private practice. There is no formal induction course for new recruits¹⁰ and the drafters acquire their knowledge on an "apprenticeship" system. Drafting is most commonly undertaken in teams of two drafters, with a junior drafter and a more senior experienced drafter; and drafters do not specialise in substantive areas of law but are allocated instructions as they are received. Somewhat unusually the OPC does not have a comprehensive style book, although it does have a Drafting Techniques Group which produces a variety of recommendations and papers on various drafting issues from time to time¹¹.

However, some see difficulties and possible disadvantages in the system. First, drafters within the OPC have to be careful to distinguish between offering alternative technical solutions to the legislative implementation of the policy and proposing changes in the policy, and this distinction is not always easy to apply in practice. Secondly, the drafters in the OPC do not specialise in specific substantive areas of law, but rather provide expertise in drafting. Of course, in drafting legislation they have to analyse fully the law relating to the legislation they are drafting, but nevertheless not being specialists in the particular area of substantive law they are perhaps that more dependent on the quality of the instructions that they receive.

It must also be emphasised that the OPC drafting function is limited in the main to Government primary legislation of general application.

It does not draft primary legislation promoted by individual parliamentarians (although it may be instructed to assist in drafting such legislation which the Government adopts politically, and some such legislation is anyway Government legislation which the Government has not been able to find space for in its own parliamentary legislative programme and is passed to individual parliamentarians to promote). In the UK Parliament, individual parliamentarians promoting legislation, or amendments to Government legislation have access to very little professional drafting assistance within the institutions of the state¹².

Neither does the OPC draft primary legislation which has specific rather than more general application ("private bills"); this is undertaken by specialist lawyers in private practice.

⁸ There is, for example, a very English tradition in the OPC that, where pressure of work permits, the lawyers gather together for a cup of tea in the afternoon!

⁹ So, at present 2 are seconded to the law reform body for England and Wales (the Law Commission), 6 are seconded to the Tax Law Rewrite Project and a further drafter is seconded part-time to work for Welsh Assembly.

¹⁰ Although this is not necessarily the case in other common law jurisdictions; so, for instance, there is an induction course for Government drafters in Ireland.

¹¹ These recommendations and papers are available on the OPC website (http://www.cabinetoffice.gov.uk/parliamentarycounsel/drafting_techniques.aspx); however, as the drafting of secondary legislation is largely decentralised in the UK, there is a general guide to its drafting, *Statutory Instrument Practice*, although this largely addresses technical rather than stylistic issues.

¹² This is not always the case in other predominantly common law jurisdictions; for instance, the Scottish Parliament has a unit to provide such drafting assistance and in Canada, specialist drafters are directly employed by the Parliament.

And perhaps of particular significance, other than the exceptions already indicated, the OPC does not draft Government secondary legislation. This, rather following the manner of civil law jurisdictions, is done by lawyers within the promoting ministry. These lawyers are not specialist drafters in the sense that they normally will only draft secondary legislation for a period of their careers.

3. How is consistency in drafting achieved?

3.1 Introduction

Good legislative drafting identifies the legal objectives and meets them fully by expressing the necessary legal rights and obligations in an accurate clear manner, while also ensuring that the draft complies with superior norms, and that it effectively and consistently relates to existing legal norms.

This is best achieved by having an authoritative drafting manual which guides the drafter in achieving this, by consistent layout and typography and a consistent approach to drafting style.

3.2 Examples of rules applied to achieve legislative clarity and coherence

In both common law and civil law jurisdictions, it is of course recognised that the most effective way of achieving legislative clarity is to adopt contemporary, and as far as possible unambiguous, vocabulary, and to draft using established rules of grammar and good writing. It is also widely recognised that clarity is assisted in adopting a consistent structure for legislation. Aside from such matters, there may be differences in emphasis in drafting style. Although it is beyond the scope of this paper to consider in detail the generally recognised elements of good drafting style in a common law context, a few examples may be of interest¹³.

The common law practice is usually to draft rights and duties as commands to an addressee, rather than as declarations or as matters of general principle.

Example 4

“It is an offence for a person to take a dog into the park”

rather than

“No dogs shall be allowed into the park”

[declaration]

or

“It is an offence for a dog to enter the park”

[provision without an addressee]

The common law practice is to draft in a direct and positive style, using the present tense for the operative aspect of the provision, and normally the indicative (rather than the imperative) and active (rather than the passive) voice, and avoiding nominalisations.

¹³ To explore this in more detail, reference should be made to the short bibliography at the end of the paper.

Example 5

“A person who has a child shall be entitled to...”

rather than

“A person who does not have a child shall not be entitled to...”

“Any person who has been convicted of an offence *is* disqualified from...”

“No person is entitled to...”

rather than

“No person shall be entitled to...”

“The Commission shall appoint the senior auditor of each Department”

rather than

“The senior auditor of each Department shall be appointed by the Commissioner”

“A person may apply...”

rather than

“A person may make application...”

The common law practice is for a provision or sub-provision of legislation normally to be limited to a single sentence.

The common law practice is to adopt a “narrative” style (unless it could create ambiguity), where the drafter assumes that in using X a subsequent reference to X will be read as it has been previously used.

Example 6

(1) A person may apply to the Ministry for a licence.

(2) Other than as provided in paragraph (3) *the application* must be submitted in triplicate.

(3) A person under 21 must submit four copies of *the application*.

rather than

(1) A person may apply to the Ministry for a licence.

(2) Other than as provided in paragraph (3) a person making an application under paragraph (1) must submit it in triplicate

(3) A person under 21 making an application under paragraph (1) must submit four copies.

4. How is the quality of legislation ensured?

For historical and constitutional reasons, the tendency in many common law jurisdictions is to draft primary legislation in a more detailed style than would be common in civil law jurisdictions. This contrast in drafting style is perhaps not as pronounced as it once was, but it has been explained by a number of factors. One is the parliamentary tradition of close textual scrutiny of draft primary

legislation, and also of secondary legislation which often has to be presented for parliamentary consideration. Another is the traditional emphasis of common law judges on textual interpretation of legislation rather than interpretation on the basis of the principle and purpose of the provision; this is not as pronounced today as it once was, but it still tends to be an underlying judicial approach to legislative interpretation.

One consequence of this context is that both parliaments and the courts are seen as providing general institutional checks on the quality of legislation. Also, the practice primary legislation being drafted by units of independent specialist drafters has tended to make these units very conscious of the need for self-regulation in matters of the quality and style of legislation. In addition, although not in the UK, many common law jurisdictions have institutional arrangements to review the quality of legislation from the perspective of such matters as the use of clear and contemporary language.

5. How is effect given to the European *acquis*?

5.1 Introduction

The implications for a Member State which fails to comply with Community law are considerable. In the context of the transposition of directives, for example, the most significant implications are: (i) a failure to transpose a directive in domestic law, or to transpose it properly, within the specified time, may result in the European Commission taking action against the Member State in the European Court¹⁴; (ii) a failure to transpose a directive in domestic law, or to transpose it properly, within the specified time, will make directly effective provisions of the directive which are precise, unconditional and not dependent on implementing measures¹⁵; (iii) an individual can rely on such directly effective provisions, both defensively and offensively, against any “organ of the Member State”¹⁶; (iv) as a Community law remedy, compensation for damage has, in certain circumstances, to be awarded to individuals against the State by national courts for a breach of Community law by the State¹⁷; (v) domestic courts are under a Community law obligation to interpret prior or subsequent domestic law in conformity with a directive (whether it is implemented or not)¹⁸; (vi) domestic courts are under a Community law obligation, in certain circumstances, to make use of existing national remedies to enforce Community obligations¹⁹.

From a drafting perspective, the practical consequences of this Community law are that a failure to transpose a directive correctly are that: (a) the drafter loses control of the text, because the text of the Directive may well prevail and because the courts will have a relatively greater degree of discretion in the way that the text is interpreted; and (b) the state and its organs may well lose a degree of forensic and regulatory control.

¹⁴ EC Treaty Art. 226

¹⁵ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case 148/78 *Ratti* [1979] ECR 1629

¹⁶ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, para 20; Case 8/81 *Becker* [1982] ECR 53]

¹⁷ where (i) the provision of the Directive creates an ascertainable right for the individual (even where it is not a directly effective one);(ii) there is a causal link between the breach of the State’s Community obligation and harm suffered by the individual and (iii) the breach is “serious”: Cases C-6&9/90 *Francovich* [1991] ECR I-5357; Cases C-46/93 *Brasserie du Pecheur & C-48/93 Factortame III* [1996] ECR I-1029

¹⁸ Case C-106/89 *Marleasing* [1990] I-4135

¹⁹ Provided the remedy (i) would not make it impossible to enforce the breach of Community law, (ii) would not discriminate between remedying breaches of national law and Community law, (iii) is proportional to the breach of Community law and (iv) is effective (including being an effective deterrent to a breach of the Community law): Case 33/76 *Rewe –Zentralfinanz* [1976] ECR 1989; Case 8/77 *Sagulo* [1977] ECR 1495; Case 158/80 *Rewe-Handelsgesellschaft Nord* [1981] ECR 1805;Case 14/83 *Von Colson* [1984] ECR 1891.

5.2 Transposition of Directives: EU dimension

EU law gives a wide discretion as to the means of transposition adopted, however there are certain limitations placed by the Court of Justice mainly in relation to the binding nature of the instrument used. Reliance on non-binding legal rules conflict with the binding legal nature of the directive. Also, the transposing measure must be binding upon all individuals. This principle is particularly important in jurisdictions which use non-legally binding measures to implement policies of a social character²⁰.

In some cases the national implementing legislation seeks to create a more stringent regime than that provided in the directive. This is permitted where the directive has a "minimum requirement clause". However, some directives specifically do not permit a deviation from the directive regime and in such cases the implementing national legislation cannot introduce an alternative regime (whether more stringent or otherwise). A more delicate problem is created where the directive is silent on the matter; here, a more stringent regime in the transposing national legislation must not conflict with other EU law or legal principles. The associated sanctions in the transposing national legislation is a sub-issue of this. Directives generally leave the form of sanction to the discretion of the Member State. Sometimes they do not even prescribe that breach of national law implementing a directive must attract civil or criminal penalties.

The choice of such penalty sometimes creates difficulties as a Member State does not have an absolute discretion in transposition. So, the form of national sanction chosen must be effective to ensure that the aims of the directive are achieved. This is difficult in cases where in the directive uses imprecise terms such as "adequate sanctions" or "sufficient sanctions". Also, transposition must not discriminate between the sanctions adopted for measures implementing directives and those laid down under related national legislation. And the notion of "related national legislation" is itself an imprecise one.

Some regulations and directives require Member States to report to the Commission on certain aspects of the EU legislation. This may require the transposing national legislation to provide for the collection of information in order to do this. The requirement to provide information for this purpose may require it to be provided in a timescale different from the substantive effect of the transposing legislation.

5.3 Institutional controls: UK dimension

To ensure that there is no breach of Community law, whether in the context of transposition or otherwise, the UK has found it useful to enact a range of provisions designed to limit the competence of institutions (as in example 7 limiting the devolved legislative competence of the Scottish Parliament) or to empower the state to direct institutions to act, or not to act, to comply with Community law (as in example 8, relating to the Financial Services Authority).

²⁰ See, for instance, Case 143/ 83, *Commission v. Kingdom of Denmark* [1985] ECR 427

Example 7: Limiting legislative competence

SCOTLAND ACT 1998 s. 35

Power to intervene in certain cases

- (1) If a Bill contains provisions--
 - (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or ... he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.
- (2) The order must identify the Bill and the provisions in question and state the reasons for making the order.
- (3) The order may be made at any time during -
 - (a) the period of four weeks beginning with the passing of the Bill...

Example 8: Powers to direct to act or not to act

FINANCIAL SERVICES AND MARKETS ACT 2000 s. 410

- (1) If it appears to the Treasury that any action proposed to be taken by [*the Financial Services Authority*] would be incompatible with Community obligations or any other international obligation of the United Kingdom, they may direct [*the Authority*] not to take that action.
- (2) If it appears to the Treasury that any action which [*the Financial Services Authority*] has power to take is required or the purpose of implementing any such obligations, they may direct [*the Authority*] to take that action.

5.4 Transposition of EU legislation: UK dimension

There follows some experience from the UK of issues that may arise in transposing EU legislation.

5.4.1 TRANSPOSITION OF REGULATIONS

Regulations are directly applicable and Member states do not need to take any further action for regulations to have legal effect in the state, unless the designation or establishment of authorities responsible for implementation is required.

Accession countries must be aware of a technical issue here since the regulations are not directly applicable prior to accession.

5.4.2 TRANSPOSITION OF DIRECTIVES

The UK experience suggests that there are a number of questions that must be addressed by the drafter.

What is the nature of the obligations in the directive?

Does the directive, for instance, require a specific regime, impose absolute standards or minimum standards?

What are the implications for the existing domestic legislative text?

This raises a number of sub-questions: does the existing domestic legislative text provide a regulatory framework? Does implementing the directive require a restructuring or refocusing of the existing domestic legislative text? Is there an opportunity for consolidation? Are there reasons for going beyond the obligations of the directive in transposing it?

Example 9: No need to alter the existing domestic legislation

The Clean Air Act 1993, s.19, empowered a Government Minister, after consultation, to require local authorities to create smoke control areas. This provision was initially considered sufficient to ensure compliance with EU directives on air quality. The view might also have been taken that implementing legislation is not required, because existing legislation can be interpreted consistently with the directive (an argument raised in *R v. Secretary of State for the Environment ex p Greenpeace* [1994] 4 All ER 352)

Example 10: Need to reformulate the focus of the existing domestic legislation

Directive 83/264/EEC on Dangerous Substances restricted the *marketing and use* of certain substances; but the then existing UK legislation regulated these substances by controlling their *supply*.

How should the implementing legislation be associated with the directive?

This may require a legislative declaration that the domestic provision is implementing the directive, and provide a specific instruction that the domestic legislation should be interpreted by reference to the directive (and by implication, any judgment of European Court on the interpretation of the directive). However, the received EU view (although it is quite difficult to see why) is that national transposing legislation should not refer directly to other Community legislation. This can be a technical problem where the directive being transposed specifically refers to other community legislation.

Example 11: Declaration that a provision implements a directive etc

CONSUMER PROTECTION ACT 1987 S. 1(1)

This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive [defined elsewhere in the legislation] and shall be construed accordingly.

What should be the general drafting approach to transposition of directives?

The UK practice is broadly to transpose directives in a way which (i) achieves the implementation of the Community obligation with the minimum of side effects on domestic law, (ii) is consistent and predictable so that the user is clear on the legal position, (iii) is proportionate so that the remedies address the risk and (iv) otherwise is, as far as possible, consistent with the domestic legislative style.

In adopting this drafting approach, UK drafters of course remain aware of general relevant principles of Community law: (i) principle of primacy of EU law; (ii) principle of direct effect; (iii) human rights jurisprudence; (iv) principle of mutual recognition; (v) the principle of full effect of EU law; (vi) effective protection of the individual and state liability; (vii) proportionality and (viii) effectiveness.

To what extent should the directive be transposed by using the “copy out” technique?

This is in effect a sub-question of the previous question. The “copy out” technique is transposing a directive by following closely the terms of the directive. This should ensure that directive is transposed satisfactorily, but it has the disadvantage that the terminology of the directive may not sufficiently clear and may not consistent with domestic drafting style.

This can be illustrated by its use in definitions. The definition in the directive can be used directly, or there can be a domestic definition with a specific default provision that in cases of uncertainty of interpretation the courts should refer to the definition in the directive, or a domestic definition can be used and the courts simply left to resolve interpretative ambiguity by reference to the directive (at their discretion and also in accordance with Community law). Case 382/92 *Commission v. U.K* [1994] ECR 2479 suggests that the safest way to ensure correct implementation and avoid deviations from the scope of the directive is to follow the exact wording of the directive as regards terminology.

Example 12: Difficulty of using the “copy out” technique

The (UK) Detergents (Composition) Regulations 1978 which implemented Directive 73/404/EEC defined "detergent" but the Regulations also provided that where any question arose about whether a substance was a detergent for the purposes of the Regulations, regard should be had to the definition of detergent in the Directive.

A UK Parliamentary committee criticised this technique as likely to confuse and to do nothing to clarify the definition.

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