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THE BATTLE TO ESTABLISH A EUROPEAN CONTRACT LAW

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Europe is the mother continent of private law. Yet what was once bound together was denatured in the 19th and 20th centuries, fissioned into a plurality of national systems of private law. Today that continent is once again deluged by a mighty wave of codification—perhaps the greatest in its history. In this predicament the mistakes of past generations can be avoided only if present legal policy-making is mindful of the pan-European dimension of its undertaking and remains so. The states of the 21st century no longer need codifications as a badge of national sovereignty; they achieve sound law for posterity only if they draft their major legislative proposals in the spirit of service to all the interconnected citizens of the internal market. That of course presupposes that European private law can once again be made visible as an entirety. It is precisely that issue which underlies the current struggle towards a European contract law—the subject of this article.

I. The new wave of codification within the fabric of the European Union

1 Jersey and Guernsey share the need of many States to modernise their private law, in particular their contract law. The Channel Islands are contemplating adopting a new Contract Code. Such objectives are very much in keeping with the current trend; truly there is no shortage of codification projects at the moment. Never before have there been so many of them (within as well as outside Europe) in such a short time – not even in the 19th and first half of the 20th centuries. Occasionally the goal in such cases is (or has been) preeminently "just" the elimination of the long-term effects of Communism from the time before the re-emergence of democracy and the market economy. However, as may be seen in the case of Romania, for example, that has not been the main motivation even in Central and Eastern Europe countries. The causes lie much deeper, in the East as well as the West. Much too often and for far too long the legacy of past generations has been clung to and its importance has been sentimentalised; this has allowed some codifications to deteriorate to the state of veritable museum pieces. It was only the great project of the European Union

that succeeded in liberating (on both national and international planes) the forces which exhorted a fundamental review of the current state of private law in Europe. These forces were of course also responsible from the outset for the build up of enormous tension, both outwards and inwards, and amongst legal scholars no less than in the politics of law. Modernisers and traditionalists are at loggerheads everywhere and on every level; the atmosphere between them is at risk of turning rather frosty. That can be seen vividly in the current political debate about whether the Union may or should adopt (at the very least) its own sales law.

II. Too many private law regimes

2 For the more reflective onlookers, however, there has long been much more at stake, not least the question of whether there are, in a European Union of what will soon be 28 states, simply too many private law regimes. How can we suppose a genuine and integrated internal market will emerge on the basis of the current plurality of legal systems (prospectively we have some 35 with which to reckon) and the complexity which they cause? Are we not perhaps repeating in the present wave of codification exactly the same mistake made by the young national states in the 19th century when they fragmented what until then had been a largely common European inheritance?

III. Directives and regulations

3 Assuming one is not inclined to dismiss these questions immediately with a brusque "no", one is confronted with the problem of developing a counteracting model. European Directives, beneficial as they may have been hitherto, cannot be – and certainly cannot remain – the only answer. They only ever address particular issues, fields which find themselves (often only as a matter of happenstance) in the glare of the political attention of the day. In the field of consumer law the *acquis communautaire* has admittedly taken on an appreciable scope. But European private law cannot really make headway in this fashion and cannot be regarded as being mapped out by such measures; Directives amount to a repairer's workshop, not an architect's drawing board. The position is different only in the case of European law-making by means of Regulations. They do not as a rule eradicate national law as such, but they are capable of setting whole areas of the law on a European footing. The private international law of the EU Member States will be entirely European in character in the not too distant future. It is, however, only individual portions of private law which can be labelled as genuine European codifications.

IV. European codification in substantive private law too?

4 Is it not conceivable and desirable that substantive private law be tackled comparably? The question has been discussed for some time under the rubric "European Civil Code". The provocation was deliberate. It was due to the name which was adopted by the academic network which later (together with the so-called Acquis Group) became the main author of the Draft Common Frame of Reference (DCFR)[1]: the "Study Group on a European Civil Code". We did not adopt this name because we were naive enough to believe that a Civil Code replacing the national regimes of private law was a possibility within our collective lifetime. We merely wanted to send a signal. The content of that message – the creed of the Group – was that the future of the law of obligations was European, and that without that dimension it had no future. The effect was a shockwave: harsh criticism of our approach emanated immediately from both England and France. Some years ago, an article appeared in the British press claiming that a band of European professors and MEPs were trying to impose the Code Napoléon on the UK; the article even reproduced a painting of the Emperor in the centre of the page. In France, articles were published in law journals which heavily criticised the use of the English language and the readiness of the DCFR to take the English (and Irish) Common Law into account. The most subtle criticism we ever received came, by the way, from my own country. The authors complained that some of the DCFR model rules were too similar to German law!

5 Hence the point must be repeated loud and clear: a European Civil Code at present does not have the slightest chance of being adopted – not because the word "Code" in some parts of Europe is an inflammatory term (the Union already today has a number of legal texts which bear the description "Code" in their official title[2]), but rather because neither the political will nor even the knowledge needed for its preparation can be mustered. The European map of law still contains too many blank spots, not least in the field of property law. Nevertheless, the label "European Civil Code" has given a name to a powerful idea. It will never disappear entirely from the minds of jurists and it exhorts us to sharpen our awareness of the wider cultural

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[1] von Bar, Clive, Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*. *Outline Edition* (Munich 2009); von Bar and Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition* (six vols, Munich 2009 and Oxford 2010).

[2] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG: 1992R2913: 20070101:EN:PDF; http://eur-lex.europa.eu/LexUriServ/Lex Uri Serv.do?uri=OJ:L:2006:105:0001:0032:EN:PDF.

framework in which we operate. During the parliamentary hearing in the course of her election to the new Commission, the "European Civil Code" was even mentioned by the new Commissioner for Justice, Fundamental Rights and Citizenship, Mrs Viviane Reding,[3] and the notion appeared also in the Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses.[4] There, depending on how one interprets them, it was one out of seven or nine options for the furtherance of European contract law. However, if one read the text carefully, one realized immediately that the option to draft a European instrument which would replace national contract laws in their entirety was only put on the list in order for it to be turned down. In the meantime, that has long since become reality, in agreement in fact with the European Parliament. Although in some of its earlier resolutions the Parliament called for the elaboration of a European Civil Code,[5] there is certainly no longer a majority today in its favour. Rather, the European Parliament decided to support the project of drafting an optional European Contract Law. For purely practical reasons, I myself have always thought that the elaboration of a European Civil Code (understood in the traditional sense of a continental Code) is something that we should consider as a long term option, but for the time being the ideological barriers are so high that it would be a fruitless exercise to discuss this any further. In that respect, and until further notice, the light at the end of the tunnel remains switched off.

V. A frame of reference

6 What alternatives are there? One of them (at any rate in the view of its authors) consists of the creation of a sort of model law, a frame of reference for important parts of the law of property and obligations and ensuring that effect is given to it *imperio rationis* (and not *ratione imperii*). The mere idea would admittedly not be worth much; it had to be moulded in a concrete form to be susceptible to – and deserving of – sensible discussion. All that academics are able to achieve is of course just a purely academic text. Thus we named it the Draft Common Frame of Reference: a text given the political seal of approval in some manner or other, a genuine Common Frame of

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[3] http://www.europarl.europa.eu/hearings/static/commissioners/answers/reding_replies_en.pdf.

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF.

[5] See eg European Parliament Resolution, 26 May 1989, OJ 1989, C158, p 400, para 14 h–j; European Parliament Resolution, 6 May 1994, OJ 1994, C205, 518.

Reference in other words, was something that we were not capable of bringing about. Regardless of what form that might take (be it eg an inter-institutional agreement between the constitutional organs of the European Union, a Recommendation or just an organisational measure internal to the Commission), that was something that would have to be adopted by others, if at all.

7 During the long years of its gestation, meanwhile, we gave precious little consideration to the question of the implementation as a matter of practical politics of our DCFR. As the Spanish scholar Díez-Picazo once formulated at a conference, we were in any case dependent on the willingness of others to an *autointegración* – by national legislators potentially interested in the project and equally by the law-makers of the European Union.

VI. From comparative law to making rules

8 The drafters of the DCFR ventured an experiment. They took the view that the epoch of non-binding intra-European comparative law should be allowed to pass and an era of pan-European rule making heralded in its stead. A European research network was formed with a size and intensity not experienced before that time. We took as our starting point the Principles of European Contract Law (PECL), which the Commission on European Contract Law had prepared under the chairmanship of the Danish scholar Professor Ole Lando – principles which in the meantime have assumed global fame.[6] This was agreed upon with the members of that "Lando Group"; many members of the Study Group on a European Civil Code (including the author of these lines) had previously been members of the Lando Group and had contributed to the success of the project from their own research funds; conversely, numerous members of the Lando Group also became members of the Study Group, among them Ole Lando and, from the United Kingdom, Professors Hugh Beale, Michael Bridge and Eric Clive.

9 Neither the Lando Group nor the Study Group has ever been commissioned to work by the European Commission. For the first seven years of its existence the Study Group was financed exclusively by national research funders from a total of six Member States of the EU at that time; it was only after important parts of the research were ready for publication that we teamed up with the Acquis Group,

[6] Lando and Beale (eds), *Principles of European Contract Law Parts I and II*. Prepared by the Commission on European Contract Law (The Hague 1999); Lando, Clive, Prüm and Zimmermann (eds), *Principles of European Contract Law Part III* (The Hague, London and Boston 2003).

mentioned earlier, under the EU's 6th Framework Programme on Research and Technological Development in a so-called Network of Excellence. This made possible the conclusion of the project over the four following years. Even here, however, it remained a matter of funded research; it did not amount, as is often wrongly asserted, to work commissioned by the European Commission. Consequently the Commission never had any influence on the content of the DCFR.

10 The DCFR is a purely academic text. It deals with contract law, the law of non-contractual obligations and some aspects of the law of movable property. In its full edition this material is embellished with comparative notes on the laws of all (or as good as all) the Member States. These "notes" were placed under the commentaries on the model rules. For that reason the DCFR in its outward appearance resembles a sort of European Restatement or, if one prefers, a "Code". It makes comparative law within Europe productive in fathoming the opportunities to create pan-European rules. It is only in the mirror of such models that the true position of one's own legal system fully emerges; it is only with the help of the fruits of comparative legal research, compressed into the form of rules, that a progressive pan-European dialogue becomes possible on what, from a legal policy standpoint, is an appropriate content and presentational format for private law.

11 A typical comparative legal study, usually confined to a few legal systems, tends (after elaborating on differences in method in resolving the given problem) to end ultimately with the thesis that the legal systems examined are nevertheless similar. In essence it is always the same. Comparative law of this type remains unengaging. It offends no one – and passes away gracefully in oblivion. The authors of the DCFR, by contrast, wanted to show – and indeed had to show – their colours. If you develop a model, you have to set out your stall on content and systematics. That of course also generates opposition, but it stirs up debate. The latter at any rate has been achieved with the DCFR. Just in the first two years since its publication the DCFR has been discussed in considerably more than a thousand articles and monographs; it has developed into something of a bestseller (in total some 8,500 copies of the paperback edition have been sold, while for the full edition in six volumes, boasting 6,500 pages but costing a princely €800, the figure is about 900); and it is currently the subject of a number of large translation projects. In 2012, a team of translators, working on the initiative of the European Parliament, will publish the model rules and the explanatory comments of the DCFR in French, German, Italian, Polish and Spanish. In China, Japan, Korea, Russia and the Ukraine further teams of translators have been formed; some of these are even working on translating the complete text of the full edition into the language concerned. As a rule a practical need as

well as academic interest is at the root of these projects; in many of these countries projects for the reform of private law in the fields covered by the DCFR are under way.

VII. An interim assessment

12 In view of this it would seem that the core aim of the drafters of the DCFR has been achieved. The DCFR is pinpointed, consulted and analysed across the globe; to what extent it ultimately finds its way into national law remains to be seen. This will vary from one area of the law to another and from jurisdiction to jurisdiction; moreover, the text will enjoy an appreciably greater resonance in teaching and scholarly writing than in case law and legislation.

13 However, in view of current developments in the European Union, it is possible at the present time to make an interim assessment. Certainly the DCFR will not – as had once been contemplated in fact – be transformed in the course of its revision into an "official" European Frame of Reference; for all that it will in all likelihood nonetheless give the development of the European Union's private law a powerful boost. The idea of an official Frame of Reference for European law making has turned out to be a project beset by both political and practical challenges. It is not an objective that can be easily described in political terms and easily championed publicly, nor is it one that can be straightforwardly implemented. Hence there will not be a CFR. The "D"CFR remains what it is: an academic model without any official seal of approval. In that condition it will retain its significance, within and beyond contract law.

14 At any rate the DCFR has kept afoot the discussion, initiated by the Lando Group, about the creation of a contract law for the European internal market – a European contract law, no less – and has breathed new life into the debate. Without the DCFR we would not be where we are today: not admittedly on the eve of codifying an instrument on all the core areas of contract law relevant to the internal market, but certainly on the eve of adopting a codification of the Common European Sales Law. Should that be a success, the door would be flung wide open for following generations. They would be able to build on this first venture. As regards the law on insurance contracts, something along these lines seems already to be emerging; the law on service contracts will, I hope, follow, at any rate for that part of the EU which has introduced the Euro. The common currency strengthens the common market; the common market strengthens the common currency. In the field of services, however, the internal market is working anything but smoothly; the complexity of the legal situation within Europe urgently needs to be reduced. First, however, the initial step must succeed and that is the step being taken in sales law.

VIII. A common European sales law *ante portas*

15 To this end the European Commission presented its proposal on 11 October 2011: the Proposal for a Regulation on the Common European Sales Law.[7] The Proposal's substantive (contract law) rules (which extend beyond sales to some aspects of contracts for ancillary services) were prepared by a body of experts under the supervision of the Commission. The provisions of the Proposal concerned with when and how the substantive laws can be made applicable were drafted solely by the Commission following consultation with its political advisers. The substantive sales law of the draft Regulation can be traced back to (and indeed, borrows heavily from) the DCFR. This was the source of inspiration and, even though its model rules of course have not been adopted on a one-to-one basis, the DCFR has passed its first great practical test in European sales law.

16 That is true not just for the sales law core of the Regulation (which as a matter of technique has been shunted into Appendix I), but also for its general political approach. The "Common European Sales Law" is in many regards based on an entirely new concept. Thus, (i) first and foremost, this is a substantive sales law and not an international sales law in the sense of law on the application of law. The draft Regulation does not contain a single provision on private international law; it merely constitutes substantive law for matters with a foreign connection. Consequently, it is only applicable in accordance with the rules of the Rome I Regulation. For that reason, technically speaking, art 6(2) of the Rome I Regulation also remains unaffected and, where foreign law is chosen, consumers are guaranteed the application of those mandatory provisions of their own law which are more beneficial to them than those of the chosen foreign law. In reality, however, it will not be necessary to carry out this comparison of the consumer protection of national and foreign law in any given case, since once the parties have chosen the Common Sales Law there will no longer be a more advantageous national consumer contract law subsisting alongside it. The reason is not because a difference in values could not occur in some exceptional situation, but rather because the corresponding autonomous law, according to its own claim to apply, would no longer be applicable to the case in hand.

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[7] COM (2011) 635 final of 11 October 2011, considered in detail in Staudenmayer, *Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht, Neue Juristische Wochenschrift (NJW)* 2011, 3491–3497. See also Wilhelm, *Rechtsbehelfe des Käufers bei Nichterfüllung nach dem VO-Vorschlag über ein neues Gemeinsames Europäisches Kaufrecht, Internationales Handelsrecht (IHR)* 2011, 225–235.

Hence, by means of the Regulation (ii) national sales law is to be created – more precisely, primarily national sales law for cross-border cases. As a matter of external appearance, therefore, some 28 new national sales laws will come into existence. What at first sign seems to be the very converse of reducing legal diversity is in truth a quantum leap in harmonization of law: the form taken by the Regulation makes it certain that these European sales laws in the nation legal systems will be the same down to the last full-stop. In this regard (iii) the national legislatures are left with only a few options to shape the law to their taste: they may decide (a) whether to make the Common European Sales Law available to their citizens for the purposes of contractual relationships which are entirely within their borders, and (b) whether to insist on one or both of the contracting parties being either a consumer or an SME – in other words, whether the Common European Sales Law should be on offer to large businesses as *lex contractus*.

17 Finally, (iv) the Common European Sales Law is conceived as a so-called "Optional Instrument". This may even be the most important point. It means that the Common European Sales Law is able to leave the autonomous sales laws untouched. It is only the parties (and no one else) who decided whether a contract should be concluded under the European sales law or (other) national sales law. The application of the European Sales Law presupposes that it has been chosen. Here once again we find the central idea of the DCFR: the European Sales Law will only govern *imperio rationis*; it knows it will flourish or founder according to the wisdom of the citizen. *Ratione imperii* it is only the implementation of this idea that is effected by means of a Regulation; it could not work without it.

IX. In Europe they always complain

18 Not even this type of non-invasive form of law harmonisation can apparently hope to be greeted with approval in all quarters. European projects are not having an easy time these days – and certainly not in the British Isles. The immediate aftermath of the Brussels summit in December 2011 on reducing public deficits and regulation of the financial markets made for disconcerting in headlines in the British press; there were rants about a "Fourth Reich", about a "crusade" against Europe, and in some quarters even the United Kingdom's withdrawal from the European Union was advocated. As coincidence would have it, it was on precisely the very same days that the House of Commons came to discuss the Draft Regulation for a Common European Sales Law. The stance taken by the House was one of

hostility; on 7 December 2011 it resolved to raise an objection under art 6 of the second Protocol to the Treaty on the Functioning of the European Union[8] on grounds of subsidiarity.[9]

19 This initiative, which had at least threatened to draw out the legislative process,[10] has fortunately fallen at the first hurdle. It would have succeeded only if a total of one third of the national parliaments (or its chambers) were likewise inclined to the view that the proposed Regulation is not compatible with the principle of subsidiarity. It fell short of the required quorum of 18 parliamentary chambers by a wide margin. When the deadline (12 December 2011) expired, it could muster only four votes.[11] The other votes, alongside that of the House

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[8] Protocol (No 2) on the application of the principles of subsidiarity and proportionality (2007) of 13 July 2007; OJ C 306, p 148.

[9] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111207/debtext/111207-0001.htm#11120739000005; http://www.parliament.uk/pagefiles/74689/23%2011%2011%20Draft%20Reasoned%20Opinion%20on%20Common%20European%20Sales%20law.pdf. There were misgivings also on the part of the UK's Ministry of Justice (http://www.justice.gov.uk/downloads/consultations/response-contract-law-call-evidence.pdf).

[10] The draft would have had to be reviewed under art 7(2) of the Protocol. The Commission could then have stuck to their current proposal, but equally they might have amended or withdrawn it. At any rate the result would have been a setback in the European law-making process.

[11] It was not always entirely unambiguous in every instance whether a parliamentary chamber intended to raise a formal (reasoned) objection on grounds of subsidiarity or merely to give expression to a general dissatisfaction with the proposal. Criticism was expressed (but without entering a formal objection on grounds of subsidiarity) by the Dutch (asserting an "excessive interference with national law": http://ec.europa.eu/justice/news/consulting_public/0052/contributions/257_en.pdf) and Czech Parliaments (http://ec.europa.eu/justice/news/consulting_public/0052/contributions/86_en.pdf), and the German Bundesrat (the upper chamber of the German legislature). The latter confined itself to a mere formal request that the matter be scrutinised (http://www.bundesrat.de/SharedDocs/Drucksachen/2010/0401-500/413-10_28B_29.html). Some Swedish MPs and the Belgian Chamber of Representatives also appear to have expressed reservations, but decided not to file a complaint. Luxembourg, Portugal, Poland and Finland also reviewed the proposal in their respective languages (see http://www.ipex.eu/IPEXL-WEB/dossier/document/COM 20110635.do).

of Commons, were given by the Austrian Bundesrat,[12] the Belgian Senate[13] and the German Bundestag.[14]

20 That the creation of a Common European Sales Law should fall foul of the principle of subsidiarity appears indeed to be simply incomprehensible. Who else if not the European Union is able to create such a law? The argument pressed by Eurosceptics is all the more subtle for that reason. Their main argument is downright perfidious. It is targeted at the legal basis chosen by the Commission for the Regulation: art 114 TFEU. That provision is concerned with harmonization of law in the internal market. In contrast to the residual competence under art 352 TFEU, art 114 TFEU does not require unanimity in the Council. If the adoption of the Common European Sales Law were to rest on art 352 TFEU, the project would be dead. That point of course has not escaped the attention of its opponents, who consequently maintain that the Common European Sales Law is not in truth directed at any harmonization of law. It leaves the national sales laws untouched and merely adds a European one and that, they argue, is not possible under the present constitution of the EU. Thus one defends oneself against an apparent invasion with the argument that the measure is insufficiently invasive! The relevance of the measure to the internal market is also called into question. Both arguments are weak. The Common European Sales Law harmonises the law of all Member States for cross-border sales contracts – not by means of private international law, but by adding to the substantive law. For cross-border cases in future, where the parties elect, it will just be the rules of the Common European Sales Law which are applicable – with the same rules applying everywhere. Such cross-border cases will be chiseled out from the autonomous law, which continues to subsist; that too is a matter of harmonization of law. On the other hand, it is not an instance of creating a new legal form which was not previously known to the autonomous laws, as for example in the case of the European Cooperative. Each autonomous law has a sales law and, unlike the law of legal persons, sales law does not have a *numerus clausus* of legal forms. It is not a new type of sales law

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[12] http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK1160/.

[13] *Proposition de Règlement du Parlement européen et du Conseil relatif à un droit commun européen de la vente (COM 2011-635), contrôle de subsidiarité et de proportionnalité, conclusion de la Commission de la Justice*, Doc Parl, Sénat, 2011–2012, no 5-1382/2; also available at http://www.senate.be/www/?MIval=/index_senate&MENUID=10000&LANG=fr.

[14] Bundestags-Drucksache 17/4565; also available at http://dipbt.bundestag.de/dip21/btd/17/045/1704565.pdf.

which is being fashioned, but rather a sales law of the Member States which is made uniform for defined categories of cases and which, moreover, incorporates the whole spectrum of existing consumer contract law *acquis communautaire*. As regards the relevance of the project to the internal market, the Commission has presented impressive figures which demonstrate how many obstacles in accessing the market are caused by the current legal diversity. A further dimension which has been given less attention is the potential for opening up the market which the prohibition on discrimination in art 20 of the Services Directive (2006/123/EC) entails. The broader that one construes the notion of "service" within the meaning of the Directive, the more the Common European Sales Law will undermine the argument of service providers that legal diversity and legal uncertainty are sufficient reasons not to provide their services to particular regions of the EU. Thus the Union will wind its way to a conclusion – if needs be, without the blessing of the British and German parliaments.

X. Jersey and Guernsey

21 Jersey and Guernsey need not "really" be troubled at all by any of this; the Channel Islands are in the comfortable situation of an observer, looking into the European Union from outside. An outsider, it must be appreciated, sometimes sees things more clearly than one whom such legislation might directly affect, whether they be a private individual or a member of a national constitutional body anxious about its powers. Outsiders can confine themselves to the question of whether they wish to make use of a foreign text as a source of inspiration. Given this perspective one will tend perhaps to address the subject with greater equanimity. If, on the other hand, the project for a contract law code for the Channel Islands should come to fruition and should other proposals from the DCFR, besides text which has found its way into the Draft Common European Sales Law, be honoured with inclusion, then the modernisation of private law in Europe will have advanced another step.

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