

Characteristics of Austrian Remedies against Enforcement and a General Analysis of their Suitability for Achieving the Objectives of Brussels I Recast

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Abstract Regulation No 1215/2012 (Brussels Ia or Brussels I Recast) was another big step forward towards the establishment of a genuine European judicial area. In the wake of the Brussels I Recast, two facts have rather soon become apparent: One, several well-known (or better: infamous) issues are sadly still unsolved. And two, some other issues have emerged. Because of the abolishment of the “exequatur procedure”, esp. the issue of remedies against enforcement, in both the Member State of origin as well as in the Member State of enforcement, has gained more importance again. Therefore this paper analysis the characteristics of Austrian remedies in enforcement and their suitability for achieving the objects of Brussels I Recast.

KEYWORDS: • Brussels I Recast • remedies in enforcement • cross-border enforcement • abolition of “exequatur” • Art. 46 Brussels I a Recast • grounds for refusal of the enforcement • implementation in the national system of remedies in enforcement

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1 Introduction

The Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters¹) that entered in force in March 2002 has from the very beginning been the matrix of civil judicial cooperation within the European Union, for it has created a secure legal framework for cross-border legal proceedings in a broad range of civil disputes.² Irrespective of the regulation's being such a great success, its operating in practice had to be subjected to a reviewing process according to Art. 73 of the Regulation, which stated that the Commission should present a report on its application and if needed, also proposals for adaptations to the regulation.³ The report that was eventually presented concluded that, in general, the operation of the Regulation was satisfactory, but that an improvement of the application of certain provisions was desirable to further facilitate the free circulation of judgements and to further enhance access to justice. As a result, for the sake of clarity a Recast was proposed.⁴

These developments have finally led to the introduction of the Brussels I a Regulation, also referred to as Brussels I Recast (Regulation No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters⁵), which has replaced the Brussels I Regulation (Council Regulation No 44/2001). The Brussels I Recast was another big step forward towards the establishment of a genuine European judicial area, mainly due to the simplification of a cross-border enforcement of debts.

In the wake of the Brussels I Recast, two facts have rather soon become apparent: Firstly, several well-known (or rather infamous) issues are sadly still unsolved. And secondly, some other issues have emerged. Because of the abolishment of the "exequatur procedure", esp. the issue of remedies against enforcement, in both the Member State of origin as well as in the Member State of enforcement, has gained more importance again. This is an important fact especially from an Austrian point of view. Therefore the success of the Brussels I Recast basically depends on its implementation into the respective national legal systems (of remedies in enforcement) of the Member States, which in some aspects differ significantly from each other.

2 Objectives of Brussels I Recast regarding enforcement

2.1 Abolition of the "exequatur" procedure

Following the political mandate by the European Council in the Tampere- and (1999) and the Hague- (2014) Programs, the main objective of the revision of the

Regulation was the abolition of the exequatur procedure in all matters covered by the Regulation.⁶

One of the considerable aspects was the issue of the varying duration of proceedings among the Member States. As regards the prior “exequatur” procedure, the general study showed that first instance proceedings before the courts in the Member States tended to last, on average, from 7 days to 4 month when the application was duly completed. When, however, the application was not duly completed, proceedings tended to last even longer. Applications were indeed quite often incomplete, so that judicial authorities had to ask for additional information. Most applications for a declaration of enforceability were successful (between 90% and 100%). Only between 1 and 5% of the decisions were appealed. Appeal proceedings could then last between one month and three years, depending on the different procedural cultures in the Member States and the workload of the courts.⁷

The main reasons for the abolition of exequatur were that certain differences amongst national rules governing recognition and enforcement of judgments did hamper the sound operation of the international market (e.g. the varying procedural duration mentioned above). Therefore provisions to ensure rapid and simple recognition and enforcement of judgements given in a Member State were thought to be essential.⁸ In order to attain the objective of free circulation of judgments in civil and commercial matters, it was considered necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgements be governed by a legal instrument of the Union not only binding, but also directly applicable: The first step had already been taken by the Brussels I Regulation; further ones by its Recast.⁹

Another important factor is mutual trust in the administration of justice in the Union. It reinforces the principle that judgements given in a Member State should be recognised in all Member States without the need for any special procedure. Last but not least, the aim of rendering cross-border litigation less time-consuming and costly also justifies the abolition of exequatur. As a result, a judgement given by the courts of a Member State should be treated as if it had been given in the Member State addressed,¹⁰ even if it is given against a person not domiciled in a Member State.¹¹

2.2 Safeguards for the defendant

The Brussels I Recast has, however, also given a good deal of thought to possible safeguards for the defendant: For the direct enforcement in the Member State addressed of a judgement given in another Member State without declaration of enforceability must not jeopardise the rights of the defence. Therefore, the person

against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgement if he/she considers one of the grounds for refusal of recognition to be present. This should include the ground that one has not had the opportunity to arrange for his/her defence where the judgement was given in default of appearance in a civil action linked to criminal proceedings. (It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Art. 59 of the 1968 Brussels Convention.¹²) As a further facilitation for the defendant, the party challenging the enforcement of a judgement given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided in this regulation, the grounds for refusal available under national law and within the time-limits laid down in the law. The recognition of a judgement should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present.¹³ In the event of a judgement containing a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of the Member State, has equivalent effects attached to it and pursue similar aims. How, and by whom, the adaption is to be carried out should be determined by each Member State.¹⁴ In order to inform the person against whom enforcement is sought of the enforcement of a judgement given in another Member State (to ensure a proper defence), the certificate established under this Regulation, if necessary accompanied by the judgement, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.¹⁵

2.3 Limitation of the enforcement and providing security

To safeguard the interests of the person seeking enforcement on the other hand, the courts in the Member State addressed should - pending a challenge to the enforcement of a judgement (including any appeal) - be able to allow the enforcement to proceed subject to a limitation of the enforcement or to the provision of security.¹⁶

2.4 Provisional and protective measures

Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under the regulation unless the judgement

containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should not be confined, under this Regulation, to the territory of that Member State.¹⁷

3 Austrian remedies against enforcement – short overview

The provisions governing enforcement are not codified in one single act of law in Austria. Rather, they are spread across several codes (Grill 2013, 87). There are, however, main legal sources, esp. the Enforcement Code (“Exekutionsordnung – EO”)¹⁸ of 1896 and the Introduction to the Enforcement Code (“Einführungsgesetz zur Exekutionsordnung – EGEO”)¹⁹, the latter containing most of all transitional provisions and legal definitions. In addition, the (subsidiarily applicable) Code of Civil Procedure (“Zivilprozessordnung – ZPO”)²⁰ provides general provisions relevant for enforcement proceedings and remedies in enforcement.

In Austrian enforcement proceedings there are numerous remedies which differ from each other in many aspects: The major distinctions arise – on the one hand - from the type of decision or from the court organ who has enacted the decision, and on the other hand from the extent and the effect on the decision appealed. To give just a hint of the wide range of remedies, the most important ones are: “Rekurs” (recourse), “Widerspruch”, “Vorstellung”, “Vollzugsbeschwerde“, „Einspruch“, „Einwendungen“. In addition to those, Austrian law offers various actions in connection with enforcement proceedings, esp. the “Oppositionsklage”, the “Impugnationsklage” and the “Exzindierungsklage”.

Decisions in Austrian enforcement proceedings are generally made in the form of resolutions (“Beschluss”, § 62 EO). In general the remedy against a resolution is the recourse (“Rekurs”, § 65 EO), which is basically ascending, not suspensive and one-sided. Exceptions do exist, but they are not to be discussed within this context. The period allowed for filling the recourse must generally not exceed 14 days as from the service of the resolution. The grounds for filling recourses are not provided by the Enforcement Code, but by the Code of Civil Procedure. An important fact is that novations are forbidden in a recourse (interdiction of novation), which encompasses both *nova producta* and *nova reperta*.

Should disputes arise during the enforcement proceedings which cannot be solved within the enforcement proceedings, according to the well-known effort to keep the enforcement procedure as straightforward as possible, the parties have to file a specific action, more precisely one of the so-called enforcement claims

(enforcement actions). Three out of these actions – the *Oppositionsklage*“ (§ 35 EO), the *„Impugnationsklage“* (§ 36 EO) and the *“Exszindierungsklage”* (§ 37 EO) – will lead to the termination of the enforcement proceedings *ex officio* if the action is sustained. The *“Impugnationsklage“* is a specific remedy that meets certain requirements due to the typical structure of Austrian enforcement proceedings: In Austria, enforcement must be granted by resolution (*“Exekutionsbewilligung”*; § 63 EO), which may be appealed by recourse. The recourse is, however, very often not an expedient tool because of the already mentioned strict interdiction of novation. As opposed to this, in the *“Impugnationsklage“* the debtor may assert new arguments – novations - that would be forbidden in the recourse.

In general, remedies in enforcement under Austrian national enforcement law do not have a suspensory effect. That means that the enforcement procedure will in principle be continued in spite of a party seizing a remedy. As a result, in many cases the decision on the remedy would take too long for an adequate defence of the party appealing a decision. Therefore under certain conditions a party may file an application for a suspending of the ongoing enforcement procedure (according to §§ 42 – 45 EO).

Finally, under certain conditions a party may file an application for terminating the enforcement (§ 39 EO). This is basically the case whenever a prerequisite for the enforcement proceedings turns out to be lacking or ceases to exist.

4 Analysis of the suitability of Austrian remedies for achieving the objectives of Brussels I Recast

4.1 General remarks

The abolishment of the *“exequatur procedure”* has of course led to considerable discussion even before this major step forward was taken in the wake of the Brussels I Recast: The main issues were related to the nature and to the extent of the implementation of this measure (Köllensperger, 2015: 44). In this context, however, it has to be brought to mind that the abolishment of the *“exequatur”* by itself was of course by no means a revolutionary measure. For this step had already been prepared through previous legal acts such as Enforcement Order Regulation²¹, the Payment Order Regulation²², the Small Claims Regulation²³ as well as the Maintenance Regulation²⁴. The real innovation rather lies in the impact, because the abolishment of the *“exequatur”* does now not only affect certain kinds of judgements respectively strictly limited areas of the civil law (cf. the legal acts of the European Union mentioned above), but Brussels I Recast and therefore civil judicial cooperation within the European Union in its entirety (Köllensperger, 2015: 45).

Although the core element of the considerations prior to the Recast – the abolishment of the “*exequatur*” – was implemented, this was finally done in a different manner than originally conceptualised and outlined by prior legal acts in the field of the European Civil Procedure Law. Most notably: Abolishment of the “*exequatur*” does not mean that the enforceability of judgements given by the Member State of origin is extended to the Member State addressed without any reservations. So recital 29 of Brussels I Recast states: The fact that a declaration of enforceability for enforcing judgements from other Member States is not needed anymore should not jeopardise respect for the rights of the defence. So, although the “*exequatur*” as a formal procedure to import judgements by the Member State of origin into the Member State addressed was abolished, its control-function has remained, albeit in a modified form. The grounds for the refusal of enforcement contained in the Brussels I Regulation have maintained in the Recast version – including the substantive *ordre public*. The review of these grounds for refusal unalteredly takes place in the Member State addressed – unlike the suggestion by the Commission²⁵, which had intended to relocate the review of the grounds for refusal (at least in part) to the Member State of Origin (Domej, 2014: 511).

However, the main difference lies in the fact that there is no “*exequatur*” prior to the enforcement anymore, and that the grounds for refusal of enforcement can only be reviewed in proceedings upon application by one of the parties (in principal upon the debtor’s request) according to Art. 46 and the following Brussels I Recast (Domej, 2014: 511). This also means that the initiative of the review of the grounds for refusal was given into the parties’ hands. Unlike the situation according to Brussels I (in which the parties had to assert a remedy in a pending proceeding, the “*exequatur*” procedure), the parties now have to initiate a special proceeding by filing an application for the review of the grounds for refusal (Art. 47 (1) Brussels I Recast).

Therefore the person against whom enforcement is sought can apply for the refusal of enforcement if one of the grounds referred to in Art. 45 of the Regulation is thought to be given (Art. 46 Brussels I Recast). The court shall decide on the application for refusal of enforcement without delay (Art. 48). On application of the person against whom enforcement is sought, the court in the Member State addressed may suspend the enforcement proceedings, either wholly or in part it (Art. 44 (1) (c) Brussels I Recast). According to Brussels I Recast there have to be at least two instances, but except for that provision it is completely up to the national legal systems to determine the court of first instance and to provide a further third instance (Art. 49, 50, 51 Brussels I Recast).

Apart from these provisions, the implementation of Brussels I Recast regarding the procedure for the application for refusal of enforcement is up to the Member

States: This includes the rules on jurisdiction, detailed procedural provisions as well as the admissibility of remedies. So Brussels I Recast grants the Member States freedom of choice to a rather great extent.

For this purpose, Germany (for example) introduced new provisions to the dZPO (§ 1115 ff dZPO) with the objective of implementing the new regulations of Brussels I Recast in the best possible way (Köllensperger, 2015: 56).

4.2 Austria

In contrast to the situation in Germany, the Austrian legal system does not have specific implementing provisions in connection with Brussels I Recast (neither in the Enforcement Code EO nor in the Civil Procedure Code ZPO at that) because the Austrian legislator did not feel the need to create implementing amendments to the Austrian Enforcement Code (EO) in connection with the Brussels I Recast (Kodek, 2014: 425).

Therefore it is rather obvious that the general (national Austrian) system of remedies in enforcement must be applied on applications for refusal of enforcement on the grounds of Art. 45 Brussels I Recast as well (Mohr 2013, 34). The interlocking of the new respectively the newly amended European provisions and our national legal system of remedies against enforcement is, however, not an easy task.

In fact, new questions did arise. The most important new issue concerns the question in which way the grounds for refusal of enforcement can be asserted by the parties in Austria.

The obvious assumption would be an assertion by recourse (§ 65 EO), since the recourse is the general remedy against decisions in Austrian enforcement proceedings. Due to the already mentioned strict interdiction of novation, however, this possibility is eliminated (Köllensperger, 2015: 56).

Instead it is arguable to classify the grounds for refusal of enforcement referred to in Brussels I Recast as a ground for terminating the enforcement proceedings (“Einstellungsgrund”) according to the Austrian national system and asserting them with an application for terminating the execution proceedings) according to § 39 of the Austrian Enforcement Code (Mohr, 2013: 34). This also complies with the actual practice regarding the refusal of enforcement according to Art. 22 Small Claims Regulation (Scheuer, 2010: 2) or the refusal of enforcement according to Art. 21 Enforcement Order Regulation (Rechberger, 2008: 2). This approach is based on the assumption that the enumeration of the grounds for refusal of enforcement (according to the national law, settled in § 39 EO) is not conclusively

regulated, as well as the principle that enforcement proceedings must be terminated if based on an insufficient foundation (Jakusch, 2015: 69).

However, there is also the option to qualify the grounds for refusal of enforcement according to Art. 45 Brussels I Recast as a ground for an “Impugnationsklage” according to § 36 EO (Oberhammer 2006, 496). This is certainly conceivable, if not necessarily the most economical option, because compared to an application according to § 39 EO such a legal action implies much greater efforts regarding time and costs, which might be regarded as unnecessary difficulty for the debtor (Rechberger, 2008: 2).

The possibility to interpret the grounds for refusal of enforcement either as a ground for terminating the enforcement proceedings (§ 39 EO) or as a ground for an “Impugnationsklage” (§ 36 EO) depicts the disadvantage of the current situation, i.e. the renationalisation of the review of the grounds for refusal. Considering the lacking of appropriate implementation legislation (except the brief framework provisions to be found in Brussels I Recast) and the rather complex national system for remedies in enforcement in the Austrian legal system (Köllensperger, 2015: 57). The question how the grounds for refusal of enforcement can be asserted, or in which detailed procedure this has to be done, is not an easy one to solve.

And there is more: If the grounds for refusal of enforcement were to be interpreted as grounds for terminating the enforcement in terms of § 39 EO, it would have to be considered that the resolution for termination only effects the concrete enforcement procedure (Neumayr and Nunner-Krautgasser, 2011: 142). The resolution to terminate the enforcement has only procedural character, it does neither affect the enforcement power of the title nor the existence of the claim to be enforced (Jakusch, 2015: 90).

According to the concept of the Brussels I Recast, however, the decision on the application for refusal of enforcement (and therefore on the presence of the grounds of refusal) ought to be binding. And if the application was granted, the title should lose its enforceability for the entire area of the Member State addressed. This wide impact is not explicitly declared in Brussels I Recast, but it is the consequence of the systematic connections of the Regulation (Köllensperger, 2015: 57; Kodek, 2014: 426). By the way, we have the same problem with regard to the other option (“Impugnationsklage”, § 36 EO) as well, because according to the prevailing opinion the “Impugnationsklage” only affects the concrete enforcement (Neumayr and Nunner-Krautgasser, 2011: 177).

The application according to Art. 46 Brussels I Recast has to be brought before the court where the appealed enforcement proceeding is pending. If the grounds for

refusal of enforcement were to be asserted as “Einstellungsgründe” (§ 39 EO), the functional competence of the court organs regarding enforcement proceedings could pose another problem: In general, the functional competence is distributed between judges and court officers. The latter are called “Rechtspfleger”, and they exercise a wide range of functions ruled in a special code called “Rechtspflegergesetz - RpfLG”. In enforcement proceedings, their sphere of activity comprises – amongst other things - the execution against movable tangible assets and against claims. The insofar unchanged wording of the relevant provision concerning the enforcement of foreign titles (§ 17 para 3 lit 1 RpfLG) does not clarify whether judges are still the competent court organs regarding the enforcement of judgments given in another Member State. This situation is tricky because the decisions concerning the enforcement of judgements given in another Member State in connection with Brussels I Recast basically have the same legal scope as the former decisions based on the old Brussels I Regulation (Kodek, 2014: 425). So the legal situation is not really satisfying in this aspect. I think a good argument here is the fact that the decision on the grounds for refusal of execution (Art. 45 and 46 Brussels I Recast) has the same scope of gravity and impact as the decision on the application for exequatur (according to the prior legal situation), which renders them sufficiently comparable. This makes a strong case for the functional competence of the judge (Köllensperger, 2015: 57).

Another issue is the well-known problem of the parallel existence of national grounds for the refusal of enforcement on the one hand and the grounds referred to in Art. 46 respectively in Art. 45 of Brussels I Recast. Art. 41 (2) of Brussels I Recast attempts to solve this problem. According to this provision, the grounds for refusal or suspension of enforcement under the law of the Member State addressed shall apply insofar as they are not incompatible with the grounds referred to in Art. 45. It is absolutely necessary to interpret this provision in connection with recital 30 of the Brussels I Recast which basically states that a party challenging the enforcement of a judgement given in another Member State should (“to the extent possible and in accordance with the legal system of the Member State addresses”) be able to invoke, in the same procedure, in addition to the grounds for refusal provided by the Brussels I Recast, the grounds for refusal under the national law (and within the time-limits laid down in that law). This brings about an averting of the previously known strict procedural separation; apparently it is up to the Member States to provide the joint assertion of both grounds for refusal provided by the regulation and national grounds (Domej, 2014: 515). It is up to the Member States to determine the rules of jurisdiction in detail. But the question which grounds of refusal are assigned to the jurisdiction of the Member State addressed is still unsettled (Köllensperger, 2015: 57).

In contrast, the question of how to implement the application for suspending the enforcement according to Art. 44 Brussels I Recast can be answered quite easily:

With regard to the Austrian legal situation, this has to be done through an application for suspending the enforcement proceedings as regulated in §§ 42 and the following of the Austrian Enforcement Code (EO).

5 Conclusion

A closer examination of the Brussels I Recast shows that the amendments regarding the recognition and enforcement of judgements in civil and commercial matters cannot be regarded as a paradigm change, least of all as a “revolutionary progress”. The abolishment of the “exequatur” is just the consequent pursuing of a once adopted strategy. A degradation of the debtor’s protection is not to be expected because of the still remaining “formalistic exequatur”. For the time being it cannot be said yet whether an implementation of Brussels I Recast without national legal acts will work without major practical problems (Köllensperger, 2015: 59). In my opinion, for the sake of greater clarity and more transparency certain national implementing rules would be valuable. Some basic rules about the proceedings on the application of refusal of enforcement would be desirable as well. Due to the fact that the Austrian legislator has as yet not implemented such provisions, it will be the task of doctrine and judicial practice to find adequate solutions for still unsolved and controversial issues.

Notes

¹ OJ L 12, 16. 1. 2001, p. 1–23.

² Commission Staff Working Paper – Impact Assessment, SEC (2010) 1547 final, 6.

³ Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), COM (2010) 748 final, 3.

⁴ Regulation (EU) No 1215/2012 of 12 December 2012, recital 1.

⁵ OJ L 351, 20. 12. 2012, p. 1–32.

⁶ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, COM (2009) 174 final, 4.

⁷ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, COM (2009) 174 final, 4.

⁸ Brussels I Recast, recital 4.

⁹ Brussels I Recast, recital 6.

¹⁰ Brussels I Recast, recital 26.

¹¹ Brussels I Recast, recital 27.

¹² Brussels I Recast, recital 29.

¹³ Brussels I Recast, recital 30.

¹⁴ Brussels I Recast, recital 28.

¹⁵ Brussels I Recast, recital 32.

¹⁶ Brussels I Recast, recital 31.

¹⁷ Brussels I Recast, recital 33.

¹⁸ Exekutionsordnung (EO) RGBI 1896/79 (available at www.ris.bka.gv.at → Bundesrecht).

¹⁹ Einführungsgesetz zur Exekutionsordnung (EGEO) BGBl 1953/6.

²⁰ Zivilprozessordnung (ZPO) RGBI 1985/113.

²¹ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims, OJ L 143, 30. 4. 2004, p. 15–39.

²² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment Procedure, OJ L 399, 30. 12. 2006, p. 1–32.

²³ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1–22.

²⁴ Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations, OJ L 7, 10. 1. 2009, p. 1–79.

²⁵ Proposal for a Regulation of the European Parliament and the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), COM (2010) 748 final, Art. 46.

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