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The European Transparency Requirement and the Inner Contradiction of General Terms and Conditions: Demonstration and Dissolution of a Conflict

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The European Transparency Requirement and the Inner Contradiction of General Terms and Conditions: Demonstration and Dissolution of a Conflict

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Requirements of transparency lie at the core of the European General Terms and Conditions regulation. This it not only a legal policy decision. Rather, transparency is a necessary flipside to the instrument's (sociologically speaking) unilateral mode of creation. At the same time, General Terms and Conditions are made for an unspecified number of addressees and cases. This nature collides with the need for transparency, as it for its part calls for more complex and thus less transparent formulations. The main question arising from this contradiction is as follows: What should be the appropriate standard of transparency in the General Terms and Conditions? This is directly linked to the solution of the conflict. For this, the approach of the jurisprudence is analysed and assessed. Ultimately, its restriction of transparency requirements by what is possible under the individual circumstances, will be affirmed, as it strikes an optimal balance between protecting the counterparty of the user of the General Terms and Conditions and allowing for effective and efficient transactions.
Keywords: General terms and conditions, transparency, European Union consumer law, information model.

Europos skaidrumo reikalavimas ir vidinis bendrųjų sąlygų prieštaravimas: konflikto įrodymas ir sprendimas

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Straipsnyje nagrinėjamas Europos bendrųjų sąlygų reglamentas, pabrėžiant skaidrumo reikalavimo svarbą. Aptariama prieštara tarp skaidrumo poreikio ir sudėtingumo, atsirandančio kuriant sąlygas, kurios taikomos daugeliui adresatų ir situacijų. Didėjantis šių sąlygų taikymo mastas lemia sudėtingesnes formuluotes, todėl sumažėja skaidrumas. Pagrindinis klausimas, kylantis iš šios įtampos, koks turėtų būti tinkamas skaidrumo lygis bendrosiose sąlygose. Straipsnyje analizuojamas teismų praktikos požiūris. Daroma išvada, kad skaidrumo reikalavimai turi būti taikomi pagal konkrečias aplinkybes. Šis požiūris užtikrina optimalią vartotojo apsaugos ir veiksmingų sandorių vykdymo pusiausvyrą.
Pagrindiniai žodžiai: bendrosios sąlygos, skaidrumas, Europos Sąjungos vartotojų teisė, informacinis modelis.

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Introduction

The transparency requirement is undeniably an integral element of the European regulatory approach to the General Terms and Conditions. By way of Art. 4 II, 5 of Directive 93/13/EEG on Unfair Terms in Consumer Contracts of 1993 (UTCD), it became a mandatory instrument within the European Union. For reasons of legal certainty, the CJEU postulated that an explicit legal norm was required for proper implementation, and so the transparency requirement is now established as part of the national regulation of the General Terms and Conditions in all EU member states. The German law, for example, has considered the transparency requirement with the complex of rules in Sections 305 II, 305c and 307 I 2 of the *German Civil Code* (BGB). Consolidated as a general principle of the European contract law by the Draft Common Frame of Reference (Art. II.-9 402 DCFR) and the proposed Common European Sales Law (Art. 82 CESL), the transparency requirement also governs clause control outside the European Union. Namely, it applies in the United Kingdom, although Section 68 I of the Consumer Rights Act 2015 as *sedes materiae* is admittedly a successor provision to Section 7 I of the Unfair Terms in Consumer Contracts Regulations 1999, which was drafted to implement the aforementioned directive, and, in this respect, it is a residual of the British EU membership. The transparency requirement is indeed truly extra-unional in Switzerland, where it has not been explicitly expressed, but is generally read into Article 2 of the *Swiss Civil Code* (ZGB) as an expression of the requirement of good faith. As is so often the case, the Swiss law has been modelled on the EU's regulatory regime.

The facets of the transparency requirement run through the system of the European General Terms and Conditions law like a common thread: The transparency of a clause is already a prerequisite for it to become part of the contract in the first place (Coester-Waltjen, 2014, p. 165). If this is the case, it then influences its interpretation in the form of the *contra proferentem* rule of Art. 5 II UTCD: ambiguities are to the detriment of the user; the principle of the 'most customer-friendly interpretation' applies. Finally, the transparency requirement covers the unfairness test. Art. 5 sentence 1 UTCD clearly states that "terms must always be drafted in plain, intelligible language" (see also Art. 4 II).

The frequently encountered further subdivision of the transparency requirement into requirements of clarity, certainty, and comprehensibility is certainly conducive to the systematic penetration of the subject matter. It should, however, not obscure the fact that it is almost impossible to reliably draw clear-cut boundaries between these sub-requirements. This is not necessary either, as the UTCD imposes the same legal consequences on all of them. For these reasons, and to maintain a reader-friendly ductus, no such internal differentiation is made below.

Its far-reaching significance has rightly earned the transparency requirement a reputation as a 'core concept' of the European General Terms and Conditions law (Coester-Waltjen, 2014, p. 165). This is not trivial. As the following analysis aims to show, the nature of the General Terms and Conditions is fundamentally conflicted. This conflict manifests in its transparency and thus influences the standard relating to it. The aim of the following analysis is to demonstrate this relationship and propose a resolution. For this, the conflict will first be identified (Section 1), and then evaluated (Section 2). The results are to be summarised concisely in a thesis-based conclusion.

1. The Inner Contradiction of General Terms and Conditions in Light of Transparency

1.1. The inherent need for transparency of General Terms and Conditions

Today's European consumer protection law relies on an information-based approach (Gardiner, 2022, p. 77). This decision is evident in a large majority of materials from the early stages of the European

Union consumer law regulation. It is indeed especially visible in a 1995 Communication, in which the Commission initially identified the following as especially troublesome: "Inadequate information lies at the root of many consumer problems so if proper information can be presented many consumer difficulties can be overcome" (European Commission, Priorities for Consumer Policy, 1995, p. 5). "A major effort to improve the information and education of consumers" was subsequently stated by the Commission as the top priority of the European consumer policy (European Commission, Priorities for Consumer Policy, 1995, p. 5). Against this background, the *Court of Justice of the European Union* (CJEU) also aptly stated "that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information" (CJEU, *GB-INNO-BM v. Confédération du commerce Luxembourgeois*).

This objective is continued in the UCTD, which is, of course, part of the EU's overarching consumer protection policy. Regarding the directive, the CJEU expressed in a similar vein that "information [...] is of fundamental importance for a consumer", and that "the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge" (CJEU, *Andriciuc v. Banca Românească SA*). In line with this overall orientation, the transparency requirement is functionally an information requirement. The 'plain and intelligible language', which Art. 4 II, 5 sentence 1 UTCG demands from a clause, is intended to enable the contractual partner confronted with the General Terms and Conditions to make an informed decision about his options for action (CJEU, *Dexia Nederland BV v. XXX and Z*; Loos, 2023, p. 283). This is realised in two facets: a clear, specific and comprehensible clause should allow the parties to understand the economic consequences of the contract, and, on this basis, make an informed decision about its conclusion. During the execution stage, it should enable the parties to know their rights and obligations in the execution of the contract so that they are not prevented from enforcing their rights and are not required to fulfil unjustified obligations.

It is an empirically proven fact that the majority of addressees do not read the General Terms and Conditions (e.g., Bakos, Marotta-Wurgler, and Trossen, 2014, p. 1). On this basis, the legitimacy of transparency control has increasingly come under scrutiny (McColgan, 2020, passim; Bar-Gill and Ben-Shahar, 2013, p. 109). After all, if a transparent design does not regularly lead to better information, why, according to the sceptics, is this burden imposed on the user? Of course, the complete abandonment of the transparency requirement is only a legal policy demand; *de lege lata*, it cannot be implemented, as the requirement is an explicitly codified instrument. Still, if it were indeed without a legitimising basis, the heavy encroachment on the contracting parties' private autonomy which the requirement brings would certainly render it appropriate to minimise its practical significance through restrictive interpretation. However, this argument is only lucid if the information model that lies at the basis of the European consumer protection strategy aims to ensure that the consumer is *actually* informed. Surely, this is its desired result. Tasking the user of the General Terms and Conditions to ensure this would, however, place an unreasonable burden upon them. After all, it is solely up to the consumer to decide whether or not to take note of the General Terms and Conditions; the user has no influence on this. On the contrary, it is a consequence of the principle of personal responsibility, which, as a correlate of its liberal ideal, is one of the foundations of the Western legal culture, that each party must inform themselves about the scope of the contract before conclusion. If they refrain from doing so, they have to bear its implications. The transparency requirement could therefore not have been based on this from the outset. However, the idea of personal responsibility fails where an actor does not even have the opportunity to inform himself. If the transparency requirement is therefore understood as a requirement to *enable* the contractual partner to obtain sufficient information, the objection that the General Terms and Conditions are not read anyway does not apply.

And, understood in this way, demanding comprehensibility from the user is perfectly legitimate. For this, it is fruitful to take a look at the constitutional law. Legislators are also subject to a transparency requirement – although it is rarely referred to as such (Müller, 2010, p. 98). Laws must be drafted in a manner so clear, specific and comprehensible that their addressees have certainty about the extent of their burden (e.g., German Federal Constitutional Court in a case of 20 June 2012) and are able to align their behaviour accordingly (e.g., German Federal Constitutional Court in joined cases of 24 July 2018). The parallels to the General Terms and Conditions transparency requirement are obvious. This is no coincidence but rather the result of central commonality between the regulatory instruments of the General Terms and Conditions and the statutory law: what the legislator is for its population, the user of the General Terms and Conditions is *cum grano salis* for its contractual partners: both unilaterally impose rules on their subjects. For the legislator, this is obvious. Now, of course it is true that the counterparty of the user is authorised by virtue of its negative contractual freedom to withdraw from submission to the General Terms and Conditions, so that, strictly speaking, such transactions always involve bilateral rulemaking. However, it is precisely the characteristic disruption of this freedom in the reality of contracting with the General Terms and Conditions that gives rise to the need for consumer-protecting regulation in the first place (see German Federal Court of Justice, civil case of 19 November 2011). The decision-making situation of the (potential) contractual partner confronted with the General Terms and Conditions undermines the consensus requirement of contract formation to such an extent that the contract concluded in this way appears, at least *de facto*, like an act of unilateral design, similar to legislation. Against this background, it is not surprising that, by some, this factual-sociological identity of effects is made into a doctrinal identity and thus, the provisions of the General Terms and Conditions are attributed the normative quality (Meyer-Cording, 1971, p. 84 ff., 92 ff.; Pflug, 1986, p. 298 ff.). Under this premise, the General Terms and Conditions and the statutory law differ only in the provenance of the norm-setter. Admittedly, this thesis is predominantly and rightly contradicted in favour of basing the General Terms and Conditions purely on a contractual agreement (recently, German Federal Labour Court in a case of 19 January 2022; Stoffels, 2024, p. 103 ff.). However, the fact that this discussion is admissible at all amply demonstrates the parallelism of the two cases, especially since the representatives of the prevailing 'contract theory' limit their opposition to the dogmatic categorisation as a legal norm. They too readily concede that the General Terms and Conditions in practice work largely equivalently to genuine legal norms (Raiser, 1935, p. 76; Bachmann, 2006, p. 119).

Requiring transparency of the product of such rulemaking, be it the General Terms and Conditions or a law, now follows from this unilateral nature. If a rule requires the consent of the obligated party in order to be effective, the latter can simply reject it if incomprehensible to them. Making use of this possibility is an expression of the aforementioned principle of personal responsibility. As stated there, if a party carelessly or recklessly accepts a rule it does not understand, it will have to live with the consequences of this decision. Special protection from the legal system is not warranted in this respect. In turn, the law may not heteronomously derogate the legally binding consensus of the parties. The situation is rather different if the rule is imposed unilaterally. The consumer is not involved in drafting the contractual document, nor can the consumer (sociologically speaking) reject it. Considerations of personal responsibility cannot be invoked. This extends to execution of the imposed rule: a party, which could not have understood its content, cannot be held responsible for noncompliance. Said responsibility does, however, not lie idle. Rather, in such a case, the personal responsibility of the user of the General Terms and Conditions kicks in: if the user desires a certain behaviour of one's counterpart, it is up to the user to ensure that the necessary conditions for this are met. Therefore, the

user holds responsibility for the sufficient information of the consumer to the point, where it is relieved by personal responsibility of the consumer. As seen before, this presents itself when the latter could understand the contractual terms, if the user so wishes.

The legitimacy of the transparency requirement may, of course, be strengthened by other aspects. For example, granting the consumer the opportunity to understand their rights and obligations should increase compliance, and therefore decrease the risk of a costly legal dispute. First and foremost, however, the transparency of unilaterally set rules functions as the operative key to appropriately distribute the responsibility of adherence to the General Terms and Conditions, as shown just above. With identical rules being in place for the statuary law and the General Terms and Conditions in mind, one may with good reason regard the intelligibility of a (prospectively) imposed rule as the necessary flipside of the authority of unilateral rulemaking.

1.2. The inherent intransparency of General Terms and Conditions

The General Terms and Conditions derive their practical significance from the weighty rationalisation effects the user benefits from when, instead of the ideal but laborious individualisation of contract contents on a case-by-case basis, and use is made of provisions that are intended to apply to an indefinite number of case constellations and contracting parties. They are therefore not concrete and individual but, instead, abstract and – as the name suggests – *general* provisions. Both these elements of the nature of the instrument conflict with a transparent design and make the General Terms and Conditions inherently non-transparent:

Firstly, one must recognise that the group of consumers addressed with any particular General Term and Condition is not a monolith. Rather, this group is made up of a diverse range of individuals who are blessed with a wide variety of cognitive capacities. Nevertheless, the General Terms and Conditions must cover this heterogeneous set with the same rule. Ensuring universal accessibility of this rule requires such simplicity that meaningful treatment of complex issues becomes impossible. Specialised, technical sectors are indeed no exception. Although the range of comprehension abilities will be smaller due to a certain self-selection of the addressees, this effect is largely compensated for by the increased level of complexity of the area.

The abstract nature of the General Terms and Conditions means that users have to regulate a large number of different cases with one and the same provision. In order for this provision to be able to cover initially unforeseeable future events and special constellations, it requires flexibility. This need naturally increases with the increasing complexity and volatility of the regulated matter. A precise and clearly formulated provision is usually too rigid to do justice to this. The rule-maker can only buy the necessary flexibility at the price of vagueness and, therefore, intelligibility for the consumer.

1.3. Synthesis

It turns out that abstract-general regulation and transparency become contradictory opposites when the subject matter reaches a certain degree of complexity. As many legal provisions deal with topics precisely of this kind, in many cases, the General Terms and Conditions simply cannot be formulated so that every conceivable contracting party can make an informed decision, and simultaneously work as an effective and efficient contracting tool. They cannot even always be formulated in this way regarding particularly intelligent consumers. In fact, leaving some contracting parties out in this respect is often an unavoidable by-product of using the General Terms and Conditions. These cases reveal a fundamental conflict between the transparency requirement and the nature of the General Terms and

Conditions: either the addressee understands the contract in front of them, or it contains a General Terms and Conditions clause with a certain content – both are not possible. This conflict does not stem from the available regulatory approach: since transparency is a necessary consequence of their one-sidedness, the conflict is inherent in the nature of the General Terms and Conditions and therefore itself unavoidable: their central characteristics require a transparent design and hinder it at the same time. Ultimately, the regulatory instrument is burdened by an internal contradiction that manifests itself in the transparency requirement.

2. Resolution of the Contradiction

This is not an operable situation for legal practice. As the legislator has refrained from explicitly commenting on the matter, ultimately, it is up to the courts to resolve the conflict. This coincides with the question of what the appropriate standard of transparency of the General Terms and Conditions should be. For this, in the following, the approach of the case law will be examined (Section 2.1). Then, it will be examined for its persuasiveness (Section 2.2).

2.1. The Court's approach

The CJEU has not yet developed a robust enough line of cases in this regard, and therefore, as a substitute, the German court practice shall be considered primarily. The *German Federal Court of Justice* regularly states that the assessment of transparency must be based on the expectations and knowledge of an *average* contractual partner of the user at the time the contract was concluded (German Federal Court of Justice, civil case of 26 October 2005). This is in line with the diction of the CJEU when it also uses the "*average* consumer, that is to say a reasonably well-informed and reasonably observant and circumspect consumer" as the standard for the required transparency (CJEU, *Andriciuc v. Banca Românească SA*; see also CJEU, *Gut Springenheide v. Oberkreisdirektor des Kreises Steinfurt*). The retreat to the average consumer implies that a significant portion of consumers need not be in a position to grasp the scope of the provision. This is a measure to take into account the diverse capabilities of consumers outlined above. However, even the average addressee is not immune to incomprehensible provisions. Because, to address the abstract nature of the General Terms and Conditions, the *German Federal Court of Justice* states with no less consistency that a clause must allow the economic disadvantages and burdens for an average contractual partner to be recognised to the extent that this can be demanded *under the circumstances* (German Federal Court of Justice, civil case of 7 February 2019). Similarly, according to another frequently used building block in the reasoning of judgments of the *German Federal Court of Justice*, the General Terms and Conditions should, *if possible*, be designed in such a way that the average customer can realise the disadvantageous effect of a clause (German Federal Court of Justice in a civil case of 9 December 2014). In cases, where considerable difficulties in addressing the various factual and legal circumstances with a more precise formulation arise, the clause will be valid (German Federal Court of Justice, civil case of 6 October 2004). Whether even the average addressee will understand it without outside assistance or not, therefore, is of no significance (see Berger and Kleine, 2007, p. 3528).

It is apparent that the handling of the transparency requirement in the German case law addresses both conflicts with the general and abstract nature of the General Terms and Conditions. As a result, it should be understood to mean that the intervention of the transparency requirement is subject to two cumulative conditions: first of all, a provision must actually be incomprehensible. Just because

a more intelligible version would have been possible does not in itself lead to a lack of transparency (German Federal Court of Justice in a civil case of 26 January 2022). This follows directly from the purpose of the transparency requirement. If it is supposed to serve as an instrument for allowing the customer to make informed decisions, it is only affected if a clause is actually incomprehensible. The benchmark for this is not every conceivable, but the average expected contractual partner. Second, it must be possible to formulate the clause in a more intelligible way under the given circumstances. This means that a clause that is incomprehensible even to the average contractual partner can nevertheless be compatible with the transparency requirement. Therefore, in the event of a conflict, the case law emphatically decides the balancing act between transparency and the want to use the General Terms and Conditions in favour of the latter: transparency is only required to the extent that it does not harm the viability of the General Terms and Conditions. They are thus granted absolute priority. In doing so, it gives great effect to form-based legal transactions, but at the cost of the transparency requirement, which loses much of its edge and sharpness.

2.2. Assessment

This practice is certainly worthy of criticism in light of legal certainty. The courts do not at all disclose the conflict at hand. Rather, the decision in favour of the general terms and conditions can only be inferred implicitly from their qualifying of the transparency requirements with the 'possibility under the circumstances'; the reasoning underlying the decision even remains completely hidden. Indeed, case law is also subject to constitutional transparency requirements: a judgment must present the basis of a decision in a consistent and comprehensible manner. It is somewhat ironic that courts themselves get into a conflict with transparency requirements when addressing this precise issue regarding the General Terms and Conditions. The quite common (albeit in other contexts) saying of the 'intransparency of transparency case law' (e.g., Lerch, 2004, p. 239) is also accurate here.

Whether the court's resolution is correct on its substance is, of course, another matter. The obvious alternative approach would be to reverse the relationship so to enforce the transparency requirements strictly in accordance with its purpose and allow the General Terms and Conditions only, when they comply with them. This would mean that every possible customer is to be given the opportunity to comprehend the General Terms and Conditions. It is equally obvious, why this is not a viable solution: users could, in practice, never fulfil this requirement and thus, the General Terms and Conditions would *de facto* be forbidden entirely. This is not possible in the current regulatory environment. In choosing to regulate the General Terms and Conditions, the European Union implicitly permits their use (under certain requirements). If a complete ban had been wished, it would have been codified instead. However, more nuanced approaches which emphasise the transparency of the General Terms and Conditions over their practical viability more strongly are nonetheless reasonably conceivable. The UTCD might require tending in this direction. Allowing even complexly structured clauses – serving practical interests or not – does indeed seem to deviate rather far from the requirement of 'plain and intelligible language' intended by the directive. This should, however, not be overestimated. Both elements of this formulation are deliberately held vague and pliable for courts to specify more precisely.

Ultimately, the issue boils down to finding the right balance of protecting the counterparty of the user from the pitfalls of the General Terms and Conditions and the benefits of the instrument. For this, one must consider the downright constitutive importance of the latter's rationalisation effects for modern market economies. As *Korobkin* aptly puts it: "A requirement that all contracts be individually negotiated would increase transaction costs so substantially that many common and productive

transactions would be rendered economically unfeasible, potentially causing commerce to grind to a halt" (Korobkin, 2003, p. 1246). This is no less true for notoriously complex subject matters, such as insurance, where a similar description of risks through the General Terms and Conditions has been characterised as an essential prerequisite for the overall existence of the industry (Kötz, 1974, p. 7, 25). If insurance contracts should exist – and there can be no doubt that they should – allowing unintelligible General Terms and Conditions is therefore unavoidable. As it can be seen, the efficacy and functionality of economic markets must be, abstractly speaking, held in a higher regard than the protection of the user's counterparty. It therefore deserves primacy in case of collision. This is especially true as the user of the General Terms and Conditions is not the sole benefactor. Rather, the counterparty of the users participates as well. Firstly, consumers use and profit from the just above-mentioned transaction types, which are only enabled by the General Terms and Conditions. Furthermore, in a competitive market, a lower cost for users should also materialise in a lower cost for their counterparties. Too strict a transparency standard does therefore not serve the consumer interest, either. Such a protection strategy is a pseudo-solution, doing consumers more harm than good.

From this perspective, the approach of the courts seems to be the ideal solution. On the one hand, it embraces the necessary and all-round favourable regulatory concept of the General Terms and Conditions. It renders no one particular content on principle unusable as the General Terms and Conditions, regardless of its vagueness and complexity. This allows all parties to benefit from their advantages, and, in turn, effectuates the modern market economies. However, the court's approach permits vagueness and complexity only so far, as it is warranted by pragmatic necessity. Hence, on the other hand, the solution provides ample room for the transparency requirement and its consumer protecting quality to unfold. In particular, it deeply impacts the drafting process of users, as they must be sensible to wasting any potential of a more intelligible design, which, if the clause is coincidentally not intelligible, would lead to its intransparency. Therefore, the question of transparency or intransparency lies solely in the drafting skill and attentiveness of the General Terms and Conditions user. This is consistent with the responsibility principle mentioned many times before, which emerges as an underlying theme of dealing with the transparency requirement. A party is welcome to use the General Terms and Conditions if it so wishes to. It is only right that they themselves are then required to fulfil the necessary conditions regarding their transparency.

Conclusions

1. Despite formally requiring bilateral consent, the General Terms and Conditions are *de facto* unilaterally created and imposed on the other party. Although not themselves legal norms, sociologically, in this regard, they match their effect. The transparency requirement is an indispensable counterbalance to this norm-like nature, as it appropriately distributes responsibility for compliance.
2. Another facet of the very nature of the General Terms and Conditions diametrically opposes the needed transparency. Their general and abstract conception demands vaguer and more complex – and therefore more difficult to understand – formulations. The General Terms and Conditions are thus an inherently conflicted instrument. This conflict manifests in the transparency requirement.
3. The jurisprudence dissolves this conflict by recognising the viability of the General Terms and Conditions as the primate. Courts do not require transparency, if a more intelligible wording is not possible under the circumstances of the specific case, or – the other way around – as far as more intelligible wording does not impair the practical efficacy of the General Terms and Conditions.
4. Although this case law warrants criticism for not being transparent itself, as courts do not directly speak to the issue at hand but facilitate their prioritisation of the viability of the General Terms and

Conditions implicitly, substantively it deserves approval. The core task at hand lies in finding the right relationship between protecting the consumer and allowing ample profiting from the advantages provided by General Terms and Conditions. The courts' approach strikes a suitable balance between the two, as no content is principally exempt from being regulated through the General Terms and Conditions, but stark attention to using intelligible language is still always required.

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