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Article

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CES Working Papers

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Suggested Citation: Margaritis, Konstantinos (2013) : Fundamental Rights in the Eec Treaty and Within Community Freedoms, CES Working Papers, ISSN 2067-7693, Alexandru Ioan Cuza University of Iasi, Centre for European Studies, Iasi, Vol. 5, Iss. 1, pp. 51-65

This Version is available at:

<https://hdl.handle.net/10419/198229>

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FUNDAMENTAL RIGHTS IN THE EEC TREATY AND WITHIN COMMUNITY FREEDOMS

Konstantinos Margaritis*

Abstract: *It has been widely argued that the European Economic Community (EEC) was based on principles of economic integrity and growth through the creation of a common market; this is not far from reality. The Treaty of Rome was full of provisions that enhanced economic co-operation and increased the sense of liberalization in Europe, such as the four, now traditional, Community freedoms. Although all the above applied, there were articles within the EEC Treaty where fundamental rights were guaranteed; more than that, fundamental rights that occurred from the Community freedoms, even in a basic level. This is of highest importance since the interpretation of those provisions gave the initiative for further development in the field of fundamental rights protection within the Community legal order, throughout legislative procedure and case law. The aim of this paper is to present the fundamental rights as highlighted in the EEC Treaty and critically approach their concept under Community law.*

Keywords: Fundamental Rights; Economic Freedoms; EEC Treaty; ECJ case law.

JEL Classification: E61; F68; J83; K39.

INTRODUCTION

Beyond dispute, the establishment of the European Economic Community in 1957 constituted an innovative procedure; based to a large extent on principles of economic integration and development too. The Treaty of Rome (EEC Treaty) can be understood as the institutional framework for an economic and monetary union with the establishment of a common market to be the far reaching aim (Belassa, 1961, pp. 3-4). This can be easily proved by the grammatical structure of article 2 EEC Treaty, where the economic growth and stability as well as the rise of living standards were demonstrated as main targets of the Community.

Under this perspective, the development of methods for fundamental rights protection within the above mentioned framework could not be characterized as a priority for the newly-established Community. Consequently, it seemed absent from the Treaty of Rome. On the other hand, even on this strictly economic institutional construction, there have been provisions related to the protection of traditional fundamental rights. Moreover, freedoms of economic nature were introduced in the Treaty of Rome, highly connected to the target of common market. The so-called Community freedoms were related to the free movement of goods and capital, free movement of workers and free provision of services to the citizens of the member states. However, even on basic level, a

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framework of fundamental rights protection could be observed within the concept of Community freedoms, which emanated from them and completed their implementation.

The aim of this paper is to analyse the form of protection of fundamental rights within the Community as included in the EEC Treaty from two perspectives; first, from the standpoint of provisions that guarantee the protection of certain fundamental rights *per se*, additionally, within the concept of the four basic Community freedoms. For the better understanding, relevant case law of the ECJ will be used. At the end, useful conclusions will be drawn regarding the level of protection of fundamental rights in the most important of the Communities through the EEC Treaty.

1. FUNDAMENTAL RIGHTS IN EEC PROVISIONS

1.1 Principle of equality

The most important principle, the cornerstone for the true function of democracy, is beyond dispute the principle of equality. The concept of equality derives from the fact that all people are born equal, have the same value and need to be respected at the same way. As mentioned at the US Declaration of Independence in 1776 “*we hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights*”, therefore all inalienable rights exist for all people.

Instituted as a general principle, article 7 EEC Treaty stated that any discrimination on grounds of nationality shall be prohibited. Any discrimination implied all aspects, such as the equal fees for an educational institute (ECJ case C-293/83 Gravier vs. City of Liege). However, the principle of equality was guaranteed on peculiar terms. It applied only under the framework of the Community and without prejudice to any special provisions contained in the Treaty. The use of more intense terms that could describe equality in a more absolute way was avoided as the founders did not intent to give to the Treaty any form of fundamental rights declaration by any means. In addition, the basis for discrimination drawn on article 7 was inadequate; it excluded regular reasons that someone could be discriminated, such as religion, race, colour, political views.

1.2 Right of establishment

Although in the same Title with free movement of persons, services and capital in the Treaty of Rome, the right of establishment should be treated as a separate fundamental right guaranteed in

the Community. In line with this opinion, the term “right” instead of “freedom” was used with the former underlying the concept of a traditional right and the latest being related to the economic freedoms provided in the EEC Treaty.

In article 52 EEC Treaty, the abolishment of restrictions on the right of establishment for citizens of a member state to another member state was mentioned. The same provision gave the definition of establishment which included the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment was effected.

In that sense, a primary right was guaranteed inside the Community (Toth, 2005, p. 242). For example, a Belgian businessman could establish his enterprise in France under the French law that is applied for his French colleagues. Moreover, the right of establishment contained a secondary right (Toth, 2005, p. 242). In the same example, the Belgian businessman could establish a part or a subsidiary company in another member state, while keeping his initial one in France.

This was exactly the aim of the founders of the Community; the freedom of development of entrepreneurship within the borders of the Community and its improvement at inter-state level. Therefore, every self-employed citizens of member state was given the right to choose freely where to run his business while keeping in mind relevant important parameters, such as taxation, bureaucracy, business law, etc.

It has been widely accepted (ECJ case C-1/93 *Halliburton Services BV vs. Staatsecretaris van Financien*; ECJ case C-55/94 *Gebhard*; ECJ case C-70/95 *Sodemare*; ECJ case C-212/97 *Centros Ltd*. See also Schermers, 1993, p. 450) that the right of establishment was granted to both natural and legal persons. The different between natural and legal persons is based on the legal status and could not be a basis of distinction in the sense of the right of establishment. The only exception referred to non-profit organizations. Since the right of establishment was guaranteed within a strictly economic institutional framework and hence was connected to business activity, could not cover non-profit organizations that, by definition, do not aim for profit.

The right of establishment could be limited only under specific circumstances. The first one was related to issues of public policy, public security and public health. The second pertained to activities that were connected with the exercise of official authority, even occasionally. More specifically, the provisions of right of establishment were deactivated when the natural or legal person pursued activities of state authority; any opposite approach would violate the core of national sovereignty of the member state.

1.3 Equal pay for equal work

Article 119 of the EEC Treaty instituted the principle of equal pay for equal work between men and women. In that way, equality at work was ensured between men and women; the aim was mostly social, so that a part of the labour force would not get exploited by being less paid (mostly women) within the labour arena of the Community of highest competition (Claussen, 1991, p. 787).

The concept of pay for the purposes of the Treaty was further analysed. Article 119 covered the ordinary, basic, minimum wage or salary and any other consideration, whether in cash or in any kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex meant that pay for the same work at piece rates should be calculated on the basis of the same unit of measurement and that pay for work at time rates should be the same for the same job.

The importance of this principle of equality was further underlined with its direct applicability on the member states. Citizens could use the protection granted in article 119 in national courts which were obliged to guarantee the right affirmed in that provision (ECJ case C-43/75 Defrenne vs. Sabena; Crisham, 1977, p. 108). Since the concept of this provision was from the very beginning of highest importance for the development of the Community in the field of social policy, article 119 should be interpreted in a broad sense so that a substantial protection of the right to equal pay for equal work between men and women would be achieved.

1.4 Access to Justice

A major right of highest importance, which absence substantially deactivates every possible provision related to fundamental rights protection, is the right to access to justice. From the very beginning of the European integration this particular right was explicitly guaranteed in article 173 of the Treaty. In the first paragraph, it was referred that both the member states and the Community institutions (the Commission and the Council) may proceed to the ECJ on the ground of incompetence of the institution that legislated, infringement of an essential procedural requirement, infringement of the EEC Treaty or any law related to its application, misuse of powers.

In addition, according to the second paragraph of article 173, the right to access to justice was guaranteed to natural or legal persons as well, under major differences compared to the member states or Community institutions. In order for a citizen to proceed, there should be a decision addressed against that person or a decision which, although in the form of a regulation or a decision

addressed to a third person, is of direct and individual concern to the former. The second was a very complicated occasion that raised interpretational problems especially with reference to the terms “direct” and “individual”.

When a regulation is of direct and individual concern is hard to be described. The interpretational approach on behalf of the ECJ has been characterized quite strict (Barav, 1974, pp. 191-198; Rasmussen, 1980, p. 112; Greaves, 1986, pp. 119-123). Under the above conditions, the proceedings against an EEC act that underlie the legal basis for further harming measures against a citizen were declined since the initial act did not affect the citizen “directly”. Particularly, in ECJ case *Plaumann*, the Court ruled that a citizen is affected “individually” when an act affects him in such a way that substantially attributes particular characteristics of peculiar nature to a citizen or when the act, under particular circumstances in which he is differentiated from all other citizens and by virtue of these factors, distinguishes him individually just as in the case of the person addressed. From the above mentioned, it can be easily understood that the successful proceedings against an EEC act on behalf of a citizen was on the edge of being practically impossible within the framework of article 173.

The approach of the concept of access to justice for natural and legal persons in Community level is rather deficient. For full protection to be achieved, the right to access to justice must be effective. This means that the proceedings against a legal act of the Community shall have fair possibilities to be successful, which was definitely not the case under article 173. The rather vague notions of “direct” and “individual” that are included in the provision in conjunction to the strict interpretational position of the ECJ make access to justice totally ineffective in a way that the true meaning of Justice cannot be applied as far as citizens are concerned.

Despite the strong criticism (Rasmussen, 1980, p. 112; Hartley, 2007, pp. 368-369), article 173 still remained innovative for the standards of the Community at that time. It was the first attempt to guarantee right to access to justice in the legal system of a brand new legal entity. Especially, the last legal basis for proceedings, the misuse of powers, constitutes the main reason of institutionalization of fundamental rights protection which generally is the protection of citizens from power abuse of the governors. The access to justice presupposes the violation (and hence guarantee) of certain rights that clarifies the action of power abuse. In that sense, no matter how incomplete it was, the provision of article 173 triggered the Community institutions for further development of fundamental rights protection in the Community legal system. Since there was no concrete catalogue at the time, the ECJ found other sources as basis for protection and hence cover this legal gap.

2. FUNDAMENTAL RIGHTS IN COMMUNITY FREEDOMS

2.1 Free movement of goods

Article 9 of the Treaty of Rome instituted the free movement of goods. It was explicitly stated the establishment of a custom union and the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect as well as the adoption of a common customs tariff in their relations with third countries. The concept of “goods” was delineated in various ECJ cases which ruled that everything valued in money that can be object of commercial transactions could falls into the concept of “goods” (ECJ case C-7/68 Commission vs. Italy par. 2).

In addition, every tax burden related to the free movement of goods was prohibited according to article 12 EEC Treaty. This burden did not have to be necessarily characterized directly as “charge” but also burdens that substantially have equivalent effect to charges were not in compliance with Community law (ECJ case C-7/68 Commission vs. Italy par. 5). In the same line, in other cases (ECJ case C-24/68 Commission vs. Italy; ECJ joint cases C-2/69 and C-3/69 Diamantarbeiders; ECJ case C-87/75 Conceria Daniele Bresciani vs. Amministrazione Italiana delle Finanze), the Court constantly prohibited every form of tax charges related to issues of free movement of goods in Community member states (a case regarding charge not being characterized as having equivalent effect to tax charges may be seen in ECJ case C-18/87 Commission vs. Germany). In the same institutional framework, the imposition of taxes, direct or indirect, by a member state to goods from another member state, higher than the ones imposed to national goods is prohibited. Finally, under article 30 EEC Treaty, all quantitative restrictions on imports are prohibited between member states.

The liberal spirit that prevailed with reference to free movement of goods consequently empowered the general economic freedom as a fundamental right of the citizens. In an attempt to define economic freedom, it applies when institutions and policies allow voluntary exchange and protect individuals and their property within the legal order. Hence, the key ingredients of economic freedom are personal choice, voluntary exchange, freedom to compete in markets and protection of person and property. The protection of economic freedom is guaranteed as fundamental right in liberal European Constitutions; for example, article 18, paragraph 1 of the Finnish Constitution, article 41 of the Italian Constitution, article 38 of the Spanish Constitution and article 5, paragraph 1

of the Greek Constitution (Gerondas, 2002, p. 303) and constitutes a special aspect of development of personality of the person in society.

With the establishment of the EEC, this particular right was not guaranteed, but also promoted to the maximum. The creation of a common market in Europe with the gradual abolishment of restrictions with reference to movement of goods provides further opportunities for increasing exports and trade; a fact that leads a growing number of citizens to participate in economic life of Europe by exercising in practice their right to economic freedom. In that sense and by taking the theoretical approach of Adam Smith into account that economic freedom leads to economic growth, the whole Community structure was based exactly on that right of economic freedom in order to achieve the targets of economic growth, stability and the rise of living standards as referred in article 2 EEC Treaty.

2.2 Free movement of workers

Free movement of workers within the Community was instituted in article 48, paragraph 1 of the EEC Treaty. The parallel reference to the abolition of discrimination based on nationality might be one of the clearest examples of fundamental right guarantee connected to a classical economic Community freedom in the founding treaty.

Paragraph 2 of article 48 prohibited any form of discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work. This was the initiative for entrenchment of non-discrimination in labour affairs in Europe (see also ECJ case C-379/87 *Groener vs. Minister for Education*; ECJ joint cases C-267/91 and C-268/91 *Keck and Mithouard*; ECJ case C-18/95 *F.C. Terhoeve vs. Inspecteur van de Balstingdienst Particulieren/Ondememingen Buitenland*).

The principle of non-discrimination in labour affairs was further explained in paragraph 3. It contained the right to accept offers of employment actually made, to move freely within the territory of Member States for this purpose (ECJ case C-53/81 *D. M. Levin vs. Staatsecretaris van Justitie*), to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action, to remain in the territory of a Member State after having been employed in that State (Grant, 2002, pp. 153-155).

Furthermore, it has been widely argued (ECJ case C-13/76 *G. Dona vs. M. Mantero*; Blanpain, 2010, pp. 276-277) that this principle has direct effect so that it could be appealed to the

courts of the member states. The protection of workers referred to every form of discrimination based on nationality, either directly based on nationality of the worker, or indirectly, based on different criteria that reach the same outcome (ECJ case C-152/73 Sotgiu; ECJ case C-419/92 Scholz; Baldoni, 2003, p. 7).

However, traditional bases for discrimination were excluded from the provision, such as colour, culture or language, religion, family status etc. Furthermore, this principle applied only to EEC citizens and only in the geographical borders of the Community. Finally, principle of non-discrimination in labour affairs was not absolute; it was limited on the grounds of public policy (ECJ case C-41/74 Van Duyn vs. Home Office; ECJ case C-30/77 R vs. Boucherau), public security or public health and referred only in private sector not in public according to article 48, paragraph 4 EEC Treaty (ECJ case C-149/79 Commission vs. Belgium).

Apart from the recognition of non-discrimination as a fundamental right within the EEC Treaty, the free movement of workers contributed to the development of another fundamental right, that of freedom of work. The core of this particular right consists of the right to freely choose and change working environment (Mayer, 1985, pp. 225-242). Under the establishment of the Community, this right of choice was highly improved in the sense that not only many more opportunities were provided to workers from a greater range of occupations, but also the possibility to compare working conditions in the member states and choose accordingly.

Nevertheless, as it has been mentioned above, the aims of the Community, especially during the initial period, were strictly economical. Being development in such an institutional environment, free movement of workers was unavoidably related to economic prosperity. Thus, working for rehabilitation did not fall on the scope of article 48 EEC Treaty (ECJ case C-344/87 Bettray vs. Staatsecretaris van Justitie). To sum up, the approach on free movement of workers seemed to seek a balance between the concept of worker as a production unit that contributes to the common market and the financial growth of Europe on one hand and the opportunity of the worker as a human being to choose to work in another country for improving his living standards and at the same time not being discriminated on the ground of his nationality on the other (Craig and de Burca, 2003, p. 701).

2.3 Free movement of services

As referred in article 59 EEC Treaty, restrictions on freedom to provide services within the Community should be abolished in respect of nationals of member states who are established in a

member state of the Community. In that sense the right of establishment was a prerequisite for the free movement of services to take place as without the guarantee of the former, the latest could not be exercised. Hence, the strong connection between the fundamental right of establishment and the economic freedom of services was proven there.

The definition of the concept of “service” was attempted in article 60 EEC Treaty. Consequently, always by taking into account the economic spirit of the Community, services were provided generally for remuneration; a fact that was confirmed in the ECJ case law where the term “profitable” service was used (Steindorff, 1987, p. 351), in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons (ECJ case C-279/80 Webb). Thus, the liberalization of the common market was substantially completed, a main target for the Community from the very beginning, by covering all aspects of trade in modern economy.

The principle of non-discrimination on the ground of nationality or residence (ECJ case C-279/80 Webb) applied regarding restrictions within the free movement of services, according to article 65 EEC Treaty. Moreover, the legal status of the service provider (natural or legal person) could not be used as a basis for discrimination for the purposes of freedom of services (article 66 combined with article 58 EEC Treaty).

A particular issue appeared with reference to the scope of the rights guaranteed under the freedom of services, whether it included the people for whom the services are intended. Advocate General Lenz, based on the grammatical structure of article 59 EEC Treaty, denied relevant rights by stating that the provision guaranteed rights to people who provide service, not to whom services are intended (Opinion of Advocate General Lenz in the ECJ case C-251/83 Haug-Adrion). A different approach was expressed by Advocate General Mancini who stated that under the guarantee of rights also to people who accept the service, the freedom of service was substantially completed (Opinion of Advocate General Mancini in the ECJ joint cases C-286/82 and C-26/83 Luisi and Carbone vs. Ministerio del Tesoro). Perfect examples could be the cases of tourism or health services; the person who accepts the service may have to move from one member state to another, where the service provider has been established (Hermans, 1997, p. 14).

The limits set in the right of establishment applied in the free movement of service as well, since articles 55-58 EEC Treaty were valid for the latest (see also the relevant sub-chapter on the right of establishment). The strong connection between the two was proven again in the structure of article 66 EEC Treaty. So services could not be provided to activities which in that State are connected with the exercise of official authority. Also the freedom could be limited on the ground of public policy, public security and public health.

2.4 Free movement of capital

As a major economic factor, provisions on capital could not be excluded from the EEC Treaty. According to liberal approaches, free movement of capital, like free movement of goods, increases the right of economic freedom which leads to economic growth within society.

In terms of fundamental rights protection, the principle of non-discrimination was included in the relevant EEC provisions in a peculiar way. Article 67, paragraph 1 stated that member states should progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in member states and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested. The structure of the provision led to various interpretations. According to one opinion (Oliver, 1984, p. 414), this principle was simply an explanation of the general abolishment of restrictions on the movement of capital. This implies that non-discrimination was not guaranteed independently as a fundamental right but as a potential restriction that a member state might have imposed and should be abolished.

Another opinion (Vaughan, 1986, p. 637) distinguished two elements in article 67, paragraph 1. Two kinds of obligations arose from this provision for the member states; on one hand the abolishment of restrictions, on the other hand non-discrimination on movement of capital. The aim of the second obligation was the equal treatment on capital regardless of the citizenship of the people involved in the trade (Mohamed, 1999, p. 56). In that sense, the principle of non-discrimination was guaranteed in the EEC Treaty as a fundamental right.

Another interesting issue on the structure of the provision was the basis of non-discrimination. Unlike other cases, non-discrimination was connected not only to nationality, but also to residence. Thus, two different notions appeared with the former being narrower to the latest (Lasok, 1986, p. 80). As long as the provision guaranteed protection from discrimination based on residence, it covered both “European” and “non-European” citizens that reside at member states. Therefore, the concept of nationality that under the framework of Community law was related to citizens of member states did not seem to pervade movement of capital.

In that sense, article 67, paragraph 1 was one of the very few cases where the protection of third country nationals was guaranteed in the EEC Treaty. This confirmed the focus of the newly-established Community on the total abolishment of any type of restrictions on the free movement of capital. In the same line article 68, paragraph 1 EEC Treaty stated that as regards the matters dealt with capital, the member states should be as liberal as possible. The meaning of the use of two concepts covering each other (nationality and residence) was rather symbolic and demonstrated the

dynamics of true combat against any possible burden related to development of the common market.

An additional basis for non-discrimination according to article 67, paragraph 1 was the place where the capital was invested. Issues were raised regarding the scope of “place” since in the modern business practice, an investment may have more than one places. For example, an Italian could have taken a business loan in Germany for investing purposes in the Netherlands and Belgium. Hence, by taking the grammatical interpretation of the provision, the place of investment in the above example is the Netherlands and Belgium and not Germany, since the loan is not an investing action by itself but a preparatory action for investment.

It has been argued (Lasok, 1986) that the principle of non-discrimination on the basis of the place of investment should not include the place of origin of the capital. However, a more expansive interpretation of the provision would be more applicable. The liberal spirit of the founders of the Community totally opposed obstacles to action that promote the movement of capital within Community, even if those actions are not purely investing. The main aim was the enhancement of common market; this aim could not be fully achieved without facilitation of actions that finally lead to investment of capital.

In any case the problem could be solved with reference to the first obligation of article 67, paragraph 1 EEC Treaty which was the abolishment of restrictions on the movement of capital. The word “movement” was used there instead of “investment”, so the transfer of capital from one place to another for investing purposes could be covered by that obligation. This provision in conjunction to the general principle of non-discrimination of article 7 EEC Treaty leads to the conclusion that non-discrimination should apply also for the place where actions of capital transfer were carried out for the investment of capital.

A final issue worth mentioning derived from the structure of article 67, paragraph 1 EEC Treaty. The responsibility of the member states to abolish restrictions on free movement of capital was up “to the extent necessary to ensure the proper functioning of the common market”. Hence, it appears that, despite the liberal background which was obvious in article 68 EEC Treaty, free movement of capital was not instituted in absolute terms unlike the other freedoms provided in the EEC Treaty (Usher, 2007, p. 1534). This issue was discussed in the *Casati* case where the ECJ ruled that the Council should decide as to the extent of application of this particular provision by taking into account the possible dangers that the abolishment of restrictions could depress.

In that sense, the Council could review that provision and allow the abolishment of restrictions at will, on a case by case basis. Hence, the application of article 67, paragraph 1 ended

up to be substantially an issue of political nature for the Council, rather than a legal norm that could be appealed to national courts in case of violation of the right to economic freedom or non-discrimination (Usher, 2007, p. 1535; for deeper analysis on Casati case see Louis, 1982, pp. 443-454; Petersen, 1982, pp. 167-182).

CONCLUSIONS

Fundamental rights protection was definitely not instituted in the Treaty of Rome; in fact it was far from the Community's targets as inspired by its founders in 1957. Nevertheless, the existence of provisions such as article 7 or article 119 EEC Treaty that contained basic principles such as equality and article 52 EEC Treaty that guaranteed the right of establishment, set the basis for further development of the level of fundamental rights protection in Europe, even though expressed on a basic, inadequate level and in accordance with economic principles.

Additionally, the integral notions of rights to the Community freedoms (capital, services, workers and goods) substantially assured a certain level of protection to citizens under the main target of the establishment of the common market. Still, this was of particular importance since it gave the opportunity for a more "humanistic" interpretation in certain cases before the ECJ.

Finally, the guarantee of the right of access to justice was from a personal point of view, the most significant fundamental right example in the Treaty of Rome. Despite its inadequacy, the right of access to justice not only triggered the ECJ for developing the protection of fundamental rights in the Community in its case law, but also it substantially demonstrated a deeper will of the founders of the Community to keep a balance of powers. From a technical perspective, as underlined in the relevant chapters, all provisions needed improvement in order to be complete for the full protection of rights in a modern, democratic society.

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