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Belgium

REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in Belgium.

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BELGIUM
REAL ESTATE

1. Overview

N/A

2. What is the main legislation relating to real estate ownership?

The main source of legislation relating to real estate ownership is the civil code. Note that the civil code has been substantially amended regarding property rights (Book 3 ("goods")). With this new Book 3, the legislator wants to modernise the law of property. The aim is to incorporate the most important texts on the law of property into the Civil Code in a structured manner, to instrumentalise it and make it more functional; and to make it more flexible and strike a new balance between freedom of contract and legal certainty.

The new Book 3 is applicable since 1st September 2021.

3. How is ownership of real estate proved?

All agreements relating to property rights, including the creation of a right *in rem* (granting of a long-term lease (*emphythéose / Erpacht*), usufruct (*usufruit / vruchtgebruik*), right to build (*droit de superficie / opstalrecht*), mortgage, easement) must, in order to be enforceable towards third parties, be notarised and transcribed and registered with the mortgage register (*Bureau Sécutité Juridique / Kantoor voor* Rechtzekerheid). The mortgage register keeps track of transfers / granting of rights *in rem* over a property over the past 30 years; it also indicates whether the property has been subject to title or zoning litigation.

Transcription as such does not constitute evidence of right *in rem*; this is the negative value of the mortgage register. It only makes the right *in rem* enforceable against third parties. To determine whether the seller / grantor does indeed have an unencumbered title, the notary conducts a search on the origin of ownership, detailing the various property transfers over the last 30 years.

Typically, for each real estate transaction, a 30-year mortgage certificate is requested from the mortgage register. Note that such formality is not accessible on-line and might take several weeks.

4. Are there any restrictions on who can own real estate?

The are no specific restriction on who can own real estate in Belgium. However, attention must be drawn on EU regulation on money laundering and sanctions that apply to all economic operators.

The transfer of real estate by a public authority might be subject to specific conditions regarding for example the type of allowed activity, minimum requirement in terms of employment, etc. Such conditions must be carefully verified on a case by case basis since the non-compliance with such condition might lead to the revocation of the original transfer or a repurchase right at favourable conditions for the public authority.

5. What types of proprietary interests in real estate can be created?

The property rights under Belgian law are as follows:

- ownership (*propriété/eigendom*) is the most complete right of enjoyment of a property and a perpetual right;
- right to build (*droit de superficie/opstalrecht*) is the in rem right of use which confers the ownership of the volumes, built or not, in whole or in part, on, above or below the land of someone else, for the purpose of having constructions or plantations thereon. The new Book 3 refers to three types of rights to build: (i) the autonomous right to build, (ii) the perpetual right to build allowing the creation of property in volume and (iii) the accessory right to build (*superficieconséquence / accessoir opstalrecht*). Regarding that last type of right to build it means that the holder

of a right of use (*in rem* or personal) shall, based on the accessory right to build embodied in its right of use, be the temporary owner of the constructions erected by it until the expiry of the underlying right of use;

- long-term lease right (*droit d'emphytéose/erfpachtrecht*) is an in rem right of use conferring full use and enjoyment of an immovable property by nature or by incorporation belonging to someone else, it being understood that the long-term lessee may not do anything to diminish the value of the encumbered property, subject to normal wear and tear, obsolescence or a case of force majeure; he or she may, except where otherwise provided, change the destination of the immovable property A long-term lease right can be granted on the land and/or on existing buildings. The long-term lease right is granted for a minimum duration of 15 years and a maximum duration of 99 years;
- usufruct (*usufruit/vruchtgebruik*) is the right that confers on its holder the temporary right to the use and enjoyment, in a prudent and reasonable manner, of a property belonging to the bare owner, in accordance with the destination of that property and with the obligation to return it at the end of the right. The usufruct is a temporary right which expires upon the death of the usufructuary. When the usufruct is granted to a legal entity, its maximum duration is 99 years (note that the declaration of bankruptcy and the voluntary dissolution put an end to the usufruct, it being specified that, unless otherwise provided for, the merger, de-merger or similar operation does not put an end to the usufruct).; and
- easements (*servitudes/erfdienstbaarheden*) are rights in rem vested on a property to the benefit of another property. They are indivisible and accessory rights that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property.

6. Is ownership of real estate and the buildings on it separate?

In accordance with the principle of accession (*droit d'accession / recht van natrekking*), buildings, plants and works on or under the ground are presumed to be the property of the owner of the land, unless otherwise agreed and proven. Exceptions to the accession principle are strictly regulated by the civil code. The Civil Code provides for the possibility of owning a building erected on someone else's land through the granting of a right to build as defined above.

The possibility of creating a property in volume is a major feature of the new Book 3. The legal structure chosen is the use of a perpetual right to build, but with an important safeguard: the mandatory provisions on co-ownership may not be infringed. The conditions for creating a property in volume are as follows:

- The right to build may only be granted by an owner, not by the holder of an in rem right of use (e.g. a long-term leaseholder);
- The right to build must be used for the division of a heterogeneous real estate complex, which requires (at least) (i) two separate volumes, (ii) actually built, (iii) with different uses and (iv) capable of independent management.
- There can be no common parts, within the meaning of the rules on forced co-ownership, between these volumes. Collective facilities are permitted and their use is to be regulated by means of easements.

7. What are common ownership structures for ownership of commercial real estate?

Investors can either acquire the real estate directly or through a corporate body incorporated in Belgium (most commonly used option).

Should the option of the Belgian corporate body be chosen, the most common corporate forms used by investors are a private limited liability company (*société à responsabilité limitée/besloten vennootschap – SRL/BV*), a public limited liability company (*société anonyme/naamloze vennootschap – SA/NV*) or an ordinary limited partnership (*société en commandite / commanditaire vennootschap – SComm/CommV*) – this type of vehicle offers more structuring and financing flexibility since it is not subject to capital protection rules, including the prohibition of financial assistance.

Investors may also choose to structure the real estate investment through a regulated vehicle being a specialised real estate investment fund (*fonds d'investissement immobilier spécialisé/gespecialiseerde vastgoedbeleggingsfonds* – FIIS/GVBF) incorporated under the form of an SA/NV or an SCS/CommV

8. What is the usual legal due diligence process that is undertaken when acquiring

commercial real estate?

Real estate due diligence (legal and tax matters) is typically performed by lawyers. The customary due diligence scope includes title, use, building and environmental permits, leases, construction and management contracts, the soil (pollution) situation, VAT and transfer taxes and litigation.

Since most of the real estate related transaction occurs through a share deal, the due diligence scope also includes the corporate law, corporate income tax, withholding tax and VAT matters and litigation related to the acquired vehicle.

Technical and environmental advisors usually carry out technical due diligence on the physical status of the property and compliance with conditions under the building and environmental permits.

9. What legal issues (if any) cannot be covered by usual legal due diligence?

Subject to the data room being set-up in a professional manner and in full transparency, all legal issues can be covered by a legal and tax due diligence. However, Regarding compliance with permits adequate cooperation with the technical advisors is required.

10. What is the usual process for transfer of commercial real estate?

Typically, parties are first agreeing on (non-binding) letter of intent (LoI) or heads of terms (HoT) setting up (i) the main commercial principles of the envisaged transaction, (ii) the assumption on which such proposed commercial principles are based, (iii) the conditions to which the transaction is subject and (iv) the envisaged timeline of the transaction and the exclusivity period.

Once the LoI or the HoT has been agreed upon and signed by both parties, the Seller makes a data room (through electronic platform) available to the purchaser and its advisors (note that in some cases, the seller may, to accelerate the transaction process, choose to perform a vendor due diligence and to make it available to the candidate purchaser). Typically the due diligence process takes between 6 and 10 weeks. During that due diligence process, parties will in most of the cases meet to discus the identified issues (red-flag meeting(s)). If no real red-flag has been identified, parties will start negotiating the contractual documentation necessary for the transaction.

In an asset deal transaction involving foreign investors parties will typically go for a twostep transaction where they will first negotiate a private purchase deed drafted in English. Once the private deed is in agreed form, parties will execute such deed and the purchaser will traditionally pay a deposit amounting to 5 to 10% of the acquisition price (the deposit is generally escrowed with the notary (of the purchaser)). The Private deed will generally foresee that the transfer of ownership over the property shall only occur upon execution of the notary deed. The private deed is then translated in French or Dutch and is put in the form of a notary deed that shall be executed by the parties some weeks after execution of the private deed. Typically, each party is choosing its own notary but nothing prohibits the parties to both work with the same notary. Upon execution of the notary deed, the purchase price is paid (generally through the third-party account of the notary) and the ownership over the property passes from the seller to the purchaser. Note that nothing prohibits parties to go for a one-step transaction where only the notary deed is executed. In case the transaction is bank financed, the notary(ies) and the purchaser will also execute a mortgage deed and as the case may be a mortgage mandate.

In a share deal transaction, parties will negotiate a share purchase agreement (SPA) regarding the shares of the entity owning (directly or indirectly) the real estate. The SPA is a private deed that does not need to be notarised. If the company of which the shares are transferred (the target company) is financed by shareholder loan and/or bank loan, such loan(s) will, on closing date, generally be reimbursed by the purchaser (on behalf of the target company). Note that in case the reimbursed loan is a mortgage backed bank loan refinanced by another mortgage backed bank loan the funds flow relating to such reimbursement will typically go through the third-party account of the notary who will execute mortgage release deed (for the refinanced loan) and the mortgage deed (for the new financing loan). Depending of the complexity of the transaction and/or the presence (or not) of condition precedent, a share deal transaction can be structure as a twostep transaction (i.e., signing and closing on a later date once e.g., the conditions precedent is satisfied) or a one-step transaction with signing and closing occurring on the same date.

11. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

In Belgium, a large number of the transaction occurs through share deal to reduce the formalities linked to an asset transfer (e.g., share deals are not subject to permit transfer and soil transfer formalities).

Moreover, unlike numerous countries, Belgium does not assimilate the sale of shares in companies whose main asset(s) consist(s) in real estate, to the sale of real estate for both corporate income tax and real estate transfer taxes (RETT) purposes.

12. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Transfer of freehold interest (i.e., full ownership) entails the automatic transfer of the occupational leases (and related rent income). Practically, parties generally notifies the tenants to inform them of the identity of the landlord and as the case may be (in case of asset deal) to notify the new bank coordinates of the bank account on which the rent must be paid. On a case by case basis, in case of asset deal, a notification must also be sent to require the tenant to issue a new rental bank guarantee in case the existing one is stipulated as being non-transferrable.

13. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

Easements (*servitudes/erfdienstbaarheden*) are rights in rem vested on a property to the benefit of another property. They are indivisible and accessory rights that cannot be sold, otherwise transferred, attached or mortgaged separately from the dominant property. They might be created by law and are referred to as public interest easements (e.g., for utilities), or by convention. In the last case, they must be enacted by notarial deed and be transcribed to be enforceable towards third parties, including the easement plan which locate the easement.

Property titles may also contain specific conditions or transfer restrictions; note that as from 1 September 2021, transfer restrictions must be limited in time and justified by legitimate reasons.

As from 1 July 2022 (at the latest), option or preferential rights to acquire property rights will have to be enacted by notarial deed and transcribed as well to be enforceable towards third parties.

14. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

No, Belgian law does not recognise the proprietary effects of trusts on assets situated in Belgium.

15. Is public disclosure of the ultimate beneficial owners of real estate required?

Real estate title mentioning the direct owner must be transcribed to be enforceable towards third parties, and therefore the identity of the direct owner is disclosed. No specific rule applies for the ultimate beneficial owner in a real estate context; therefore, the general rules on disclosure of UBO have to be followed.

16. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Transfer of real estate asset in full ownership or transfer of a usufruct right is subject to transfer tax at a rate of 10% (Flanders Region) (that should increase to 12% as of 1st January 2022) or 12.50% (Brussels and Walloon Regions) computed on the higher of the transfer price or the market value.

The granting of a long-term lease right or of a right to build is subject to 2% transfer tax computed on the total of (i) the agreed price for the duration of the right and (ii) the charges borne by the beneficiary (usually assessed at 5% of the agreed price). In case an existing long-term lease right or right to build is transferred, the taxable base shall be composed of (i) the transfer price, (ii) the price that remains payable to the owner until expiry of the right and the charges borne by the beneficiary.

The owner of a property right is subject to an annual property tax, calculated on a deemed locative value of the property and the rate of which varies per Region and per Municipality. Except for residential leases, this property tax is usually recharged to the tenant.

Depending on the Region and municipality where the real estate is located, local taxes may also apply; they are usually recharged to the tenant.

17. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

Commercial premises are rented via a common lease or a retail lease. Common leases (e.g., for office spaces) are regulated by the Civil Code, and those provisions are not mandatory except for the prohibition of perpetual leases. Retail leases apply to professionals that are in direct contact with the public in the leased premises,

which are primarily used for retail activities. These leases are governed by the Commercial Lease Act, which includes a wide raft of mandatory legal provisions, mostly for the benefit of the tenant.

- No specific provision applies in a common lease. Retail leases are concluded for a minimum term of 9 years, subject to a tenant's break option every 3 years and a tenant's option to renew the lease 3 times.
- Survey of the premises. The parties must draw up a survey report of the premises within one month of occupancy. This measure is protective to the landlord since, in absence of such survey, the tenant is deemed to have received the premises in the same condition as that in which they are returned upon termination of the lease.
- Maintenance and repairs. The default rule is a tenant-friendly provision but parties often derogate to provide that the landlord only support the major repairs (e.g., structure, roof). It is also allowed under Belgian law to provide that all repairs, including major repairs, are borne by the tenant.
- The parties can provide for a (yearly) variation of the rent. If the parties agree to link this variation to the cost of living, the application of the health index and the formula set out by law is compulsory.
- Rent review. The Civil Code does not contain any provision in relation to rent review in a common lease. Under a retail lease, for a period of 3 months prior to the end of each 3-year period, each party can file a request to review the rent, provided that the rent value of the leased premises has changed by at least 15% due to new circumstances.
- Alterations and improvement works. In a common lease, and unless otherwise agreed, tenants are only allowed to alter the premises if the alterations can be removed at the end of the lease without damaging the premises. In a retail lease, tenants are allowed to perform any necessary useful and important works to adjust the premises to his business needs, provided the following conditions are met: (i) the works do not permanently alter the structure of the property, (ii) the total cost does not exceed 3-year rent and (iii) the works do not affect the safety of the property, its aesthetic value or its health aspects. In addition, the consent of the landlord is required.

18. What (if any) Covid-19 related regulatory controls are in place which affect landlords' abilities to enforce tenant obligations in commercial leases?

Belgium has not enacted this type of legislation that provides for restrictions, but the different Regions have put in place a loan mechanism, for the tenant to continue paying the rent, linked to an effort of the landlord in terms of rent reduction or waiver.

19. How are use, planning and zoning restrictions on real estate regulated?

As a matter of principle, the "polluter pays" principle is applicable in Belgium, so an owner should not be held liable for contamination caused by another person (e.g., a tenant). However, each regional legislation on this subject provides for a "waterfall" responsibility, the first in row being the polluter but, in the absence of identification or in the case of bankruptcy, there will be a recourse on the owner. It is therefore highly recommended to have appropriate verifications carried out, from both an environmental and an insolvency standpoint.

The most used way to determine who is the polluter, is to see who holds the environmental permit. The person (e.g., a tenant) who is operating an activity that entails potential risk for the health and/or environmental, a so-called 'risk activity', is must request an environmental permit. This environmental permit shall serve as trigger for (future) environmental obligations. Note however that it works as a rebuttable presumption: (i) the person who caused contamination without holding an environmental permit remains responsible and (ii) the holder of an environmental permit can still demonstrate he has not caused the contamination.

20. Who can be liable for environmental contamination on real estate?

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21. Are buildings legally required to have their energy performance assessed and in what (if any) situations do minimum energy performance levels need to be met?

Depending on the Region where the building is located, certain transactions will trigger the obligation to deliver an Energy Performance Certificate (EPC) and therefore to assess the energy performance of the building concerned. An EPC is valid for 10 years. The applicable regulations can be summarised as follows:

- In the Flanders Region: The sale or lease of an EPC unit triggers the obligation to deliver an EPC. An EPC unit is defined as (i) a residential unit that has the necessary housing facilities to function autonomously or (ii) non-residential unit with an autonomous function (i.e., used for non-residential purposes such as office, with a usable surface that does not exceed 500 m², with a total non-residential surface in whole not exceeding 1,000 m²).
- In the Brussels Region: The sale (incl. the granting of a usufruct right, a right to build or a long-term lease right), or the lease of an EPC unit triggers the obligation to deliver an EPC. An EPC unit is defined as a residential unit with a surface exceeding 18 m² or an office space with a surface exceeding 500 m².
- In the Walloon Region: The sale or lease of an EPC unit triggers the obligation to deliver an EPC. An EPC unit is defined as a residential unit (i.e., each unit in a residential building that has the necessary housing facilities to function autonomously).

In addition, the construction of new buildings or renovation works that require a building permit shall also trigger EPC obligation (e.g., assessment EP levels, environmental feasibility study) the details of which differ for each Region.

22. Is expropriation of real estate possible?

Expropriation of real estate by a public authority is possible for reasons of public interest (e.g., the redevelopment of an area within a municipality). The authority shall then enact an expropriation plan that can be disputed before administrative courts. In the execution phase, the authority is obliged to pay a fair and prior compensation for the expropriated property.

23. Is it possible to create mortgages over real estate and how are these protected and enforced?

The mortgage over the property right is typically included in the security package. Full ownership, long-term lease right, right to build and usufruct right can be mortgaged.

A mortgage is an immovable right in rem that gives the beneficiary of the mortgage a priority right over all other creditors (subject to the priority of certain statutory preferred creditors) to the payment of the secured debt on the proceeds of the sale of the mortgaged property. It includes any ancillaries. Any lease payments which fall due after the notification of an enforcement attachment on the real property (*saisie-execution immobilière / uitvoerend beslag op onroerend goed*) will inure to the benefit of the mortgagees. Also, insurance proceeds arising from the destruction or decrease in value of the insured property must be paid to the mortgagee of such property, unless the proceeds are used to rebuild or restore the property. Likewise, any improvements will be subject to the mortgage. A mortgage on land will extend to the buildings erected on it.

A mortgage is an accessory right, which means that it implies the existence of a debt or claim which it secures. A mortgage follows the principal debt it secures. If the principal debt is extinguished, the mortgage will no longer exist. Nevertheless, a mortgage can be granted to secure specific future claims. Even a mortgage for all debts (*toutes sommes / alle sommen*) is recognised under Belgian law. Such mortgage secures all future debts owed by a party to the mortgagee, to the extent at least that such debts form part of the business relationship between the parties that underlies the mortgage.

A (conventional) mortgage must be created by way of a deed executed before a civil law notary in one of Belgium's official languages. The deed must identify the property (nature and location), the secured liabilities and specify the amount secured by the mortgage. If the mortgagor is represented by a proxy, the proxy must

also take the form of a notarial deed. Accordingly, the presence of duly authorised supervisory directors or management executives before the notary is always required when executing a deed of mortgage, either at the closing, or if by proxy, before the closing.

The mortgage deed must be registered within 15 days from the data of execution of the deed; such registration is done by the notary. The transcription to the mortgage registry is required to perfect the mortgage; the formalities for such transcription are also fulfilled by the notary. The transcription determines the ranking of the mortgage.

Under Belgian law, a mortgage is enforced by the sale of the mortgaged property. In order to enforce the mortgage, the mortgagee must have an enforceable title (*titre exécutoire / uitvoerbare title*). Court decision is not the only means of conferring an enforceable title, a notarial deed can also grant an enforceable title if it meets certain requirements.

If the mortgage deed in question is not an enforceable title, the mortgagee will first need to obtain a final court decision, ordering payment under the loan agreement, before enforcing the mortgage. The length of such proceedings depends on the debtor's attitude. If the debt is 'undisputable', the lender can request that the case be heard at the introductory hearing, or at a postponed hearing shortly afterwards. In that case, a judgment can be obtained within a few months. However, the debtor can easily block these short-term proceedings by (even formally) disputing the claim in a trial brief. In that case, full litigation, with the exchange of trial briefs between the parties, cannot be avoided. Such proceedings can easily take a year or even more. In the case of appeal, it could take several years before obtaining a final judgment.

If the mortgage deed in question is an enforceable title, the enforcement procedure can be initiated directly. The mortgage enforcement procedure is conducted according to the rules of enforceable attachments on immovable properties.

These are, in brief:

- first, the lender has to serve an order to pay on the debtor. This is a final formal notice of demand to pay the debt;
- second, a writ of enforceable attachment must be served after a period of 15 days but within 6 months after the payment demand has been served. This writ has to be copied into the mortgage registry;
- third, within one month after the entry of the writ in the mortgage registry, the mortgagee files a request with the court to appoint a notary, who will be in charge of the auction. This delay of one month is not binding, and is generally not adhered to as the mortgage registries do not usually return the copied writs in time;
- fourth, a public auction is organised for which the notary drafts the conditions of the sale according to the law and the notarial practice; and
- finally, the notary proceeds with the distribution of the proceeds.

24. Are there material registration costs associated with the creation of mortgages over real estate?

Mortgages are subject to 1% transfer tax and 0.3% inscription duty computed on the amount for which they are inscribed (principal amount increased by ancillary costs). The enforcement of a mortgage results in a sale being subject to transfer taxes.

Considering the tax cost associated to mortgages, it is market practice – although not for all types of lenders (e.g., Pfandbrief compliance lenders) to vest a mortgage for a relatively small amount and to grant a mortgage mandate for the remainder. A mortgage mandate is not subject to such transfer tax and inscription duty, but it is not a security interest. It is an irrevocable mandate of the owner to an agent of the lender, which allows such agent to create, for the benefit of the lender, a mortgage on specific property of the owner and for a specified debt. The conversion of a mortgage mandate into a mortgage triggers the aforementioned 1% transfer tax and 0.3% inscription duty.

25. Is it possible to create a trust structure for mortgage security over real estate?

In the traditional common law approach, the security for a syndicated loan is usually granted to the Security Agent or Trustee, acting in such capacity for the benefit of the underlying syndicate members. To the extent the security can indeed be effectively granted solely to the Security Agent or Trustee (and not to the syndicate members themselves), special security transfer requirements that may apply in case of further syndications or loan transfers can be avoided.

Except for pledges on financial instruments, bank accounts and financial receivables, which can be granted to Security Agents or Trustees, the prevailing view in Belgium is that any other security, especially a mortgage, for a debt can only be granted to the very

creditor of such debt, and not to a representative. Since the Security Agent or Trustee are not lenders as such, the loans will not benefit from the mortgage. Thus, the market had to develop alternative solutions, the most applied being the parallel debt. In the case of a parallel debt, an additional and separate debt is created by the obligors towards the Security Agent/Trustee for an amount and under terms and conditions like the principal debt. The Security Agent/Trustee becomes the sole creditor of the parallel debt. It is provided that any payment under the parallel debt will reduce the principal debt obligations to the same extent. Likewise, any payments under the principal debt obligations will reduce the parallel debt. The security is then created in favour of the Security Agent/Trustee for securing the parallel debt obligations. The principal obligations may then remain unsecured. Also, if a lender transfers its portion of the principal obligations, the parallel debt remains untouched with the Security Agent/Trustee, and there is no need as such to perform any special transfer requirements to preserve the security.

A limitation to any parallel debt approach is that the security created in favour of a Security Agent/Trustee will not grant any right in rem to the underlying lenders. The lenders themselves will not be able to realise any security. Moreover, upon realisation they will only have a contractual claim against the Security Agent/Trustee for the on payment of the realisation proceeds. Therefore, under a parallel debt approach, the syndicate banks run a credit risk in respect of the Security Agent/Trustee, which they would not have run had they been direct beneficiaries of the security. Even if a trust should be declared over the assets and proceeds, such risk is likely to persist since Belgian law does not recognise the proprietary effects of trusts on assets situated in Belgium.

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