

House of Commons
Home Affairs Committee

**EXTRADITION BILL:
Government Response to the
Committee's First Report**

First Special Report of Session 2002–03

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HOME AFFAIRS COMMITTEE

The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Home Office and its associated public bodies; the administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office.

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FIRST SPECIAL REPORT

The Home Affairs Committee has agreed to the following Special Report:

EXTRADITION BILL: GOVERNMENT RESPONSE TO THE COMMITTEE'S FIRST REPORT OF SESSION 2002–03

The Home Affairs Committee reported to the House on the Extradition Bill in its First Report of Session 2002–03, published on 5 December 2002 as HC 138. The Government Response to that Report was received on 12 February in the form of a memorandum to the Committee. It is reproduced as an Appendix to this Special Report. We asked the Government to reply in time for the debate on report stage of the Bill and are grateful that this has been done.

APPENDIX

GOVERNMENT RESPONSE TO THE FIRST REPORT FROM THE HOME AFFAIRS SELECT COMMITTEE, SESSION 2002–03: EXTRADITION BILL

Introduction

The Government welcomes the Home Affairs Committee's report on the Extradition Bill.

The need for reform of the extradition process is widely accepted. The current system allows those facing extradition to delay their return way beyond what is necessary to ensure they are not being unfairly treated. In extreme cases it can take more than five years to send someone to another EU country. That is not in the interests of justice or the victims of crime.

The Extradition Bill therefore aims to remove the possibilities for delay by removing the many, overlapping opportunities for appeal. In relation to our EU partners the Bill introduces the European arrest warrant, which will greatly simplify the extradition process. For other countries the most significant change is to the appeal process.

However, the Government is aware of the need to balance reform with the protection of those facing extradition. We have been open about the changes we intend to make and published the draft Bill for consultation in June 2002. We are particularly grateful to the Home Affairs Committee for its response and suggested improvements, a number of which we have accepted.

A detailed response to each of the Committee's recommendations follows.

Response to recommendations

1. We recommend that, in order to provide some safeguard against clear abuses of the new procedure introduced under the framework decision, the Home Secretary give consideration to the following proposal: that in each case the district judge should look at the terms of the offence specified in the EAW and make a statement as to whether dual criminality applies. In cases where the alleged offence is not a crime in the UK a separate decision about whether to extradite should then be made by the Home Secretary, who is responsible to Parliament (paragraph 31).

The Government believes that where a person goes abroad and breaks the law of another EU country he should expect to face justice, irrespective of whether the conduct would constitute a crime in his home country. The fact that the person has managed to cross a border before being apprehended should not allow him to escape justice.

The Government therefore has no objection of principle to the removal of the dual criminality requirement in the circumstances envisaged by the framework decision nor do we believe that the new procedure will lead to "clear abuses".

The Government does not see what useful role the Secretary of State could play in these cases nor on what basis he would be expected to take a decision. However, involving the Secretary of State would complicate the procedure and would create additional opportunities for delay—any decision taken by the Secretary of State would be subject to separate challenge and appeal.

2. We recommend that Clause 1(1) be amended to specify that only countries that are signatories to the framework decision may be designated territories for the purposes of Part 1 of the Bill, and that Clause 68(1) be amended to specify that only those

countries with which the UK has general extradition arrangements may be designated territories for the purposes of Part 2 of the Bill (paragraph 41).

It is the Government's intention to designate all existing and future EU Member States as Part 1 countries. In common with other EU Member States we also intend to designate Norway and Iceland as category 1 countries operating the EAW. Beyond that there are no plans to add any other country to Part 1.

However, it is possible that at some point in the future it would be desirable to add another country—perhaps a trusted Commonwealth or bilateral treaty partner—to Part 1 and the Government does not believe that we should remove the flexibility to allow for this. Any such decision would, of course, be subject to Parliamentary approval.

Similarly, in relation to what will become Part 2, it is currently possible for any country with which we do not have standing extradition relations to make an ad hoc extradition request to the UK. We would not want to lose that facility, not least because the reciprocal nature of extradition means that to do so would put in doubt the UK's ability to make ad hoc outgoing requests.

3. If the previous recommendation is not accepted, then Clause 205 should be amended to provide that Orders in Council made under clauses 1(1) and 68(1) may not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House (Paragraph 43).

4. We do not accept that Parliament should be constrained by the precedent of the Extradition Act 1989 from requiring an appropriate degree of parliamentary scrutiny for delegated legislation that may have the effect of removing the significant safeguards for individuals subject to extradition requests (paragraph 43).

This matter was discussed extensively during Committee Stage of the Extradition Bill. During those debates the Government indicated that it was prepared to consider making this change if a very strong case could be made for doing so. The Government has yet to be persuaded of the merits of this change.

The UK currently designates our extradition partners by the negative resolution procedure and while the Government accepts the Committee's assertion that we should not always be bound by precedent we think we should only depart from it where good reason is shown. The present designation procedure has existed for many years and has not given rise to any problems. Given that Parliamentary time is inevitably limited we see no reason to depart from the present arrangements. The Government does not accept that in designating countries under clauses 1 and 68 we will be "removing the significant safeguards for individuals subject to extradition requests".

5. In relation to the dual criminality requirement, we can see no justification for eroding the basic level of protection provided by the framework decision, by removing the protection in relation to offences carrying a maximum penalty of 12 months or more where the framework decision requires the UK to do so only in relation to offences with a maximum penalty of at least three years, and we are dismayed that the Home Office is seeking to do so (paragraph 51).

6. We recommend that the three-year limit specified in the framework decision should be retained in UK domestic law (paragraph 51).

The framework decision requires us to remove the dual criminality requirement for all list offences which attract a maximum penalty of at least three years in the requesting state.

However, thresholds in extradition have always been based on 12 months and we believe introducing a three-year threshold would be a novel departure and could lead to confusion. The Extradition Bill therefore seeks to remove the dual criminality requirement for all list offences which attract a 12-month penalty or more in the requesting state.

The ‘list’ is a list of serious types of crime. Within those headings there are a large number of serious crimes that have a minimum threshold somewhere between one and three years. The Government does not see why they should be excluded from the simplified procedure applying to list offences.

During Committee Stage the Government sent Members of the Committee a list (attached at annex A) of some of the UK offences which attract a maximum penalty of 1–3 years. This includes some serious crimes. It is also worth noting that UK sentence thresholds tend to be higher than those of our EU partners so an offence attracting a maximum penalty of 1–3 years in another EU Member State might well attract a maximum penalty of over three years in the UK.

As important as the practical arguments, however, is the Government’s commitment to the principle of mutual recognition and our determination to play a leading role in the development of that principle in preference to full-blown harmonisation. We do not believe that our approach should be characterised by doing the bare minimum necessary to comply with our obligations under the framework decision. Rather, where it is in the UK’s interests and in the interests of justice, we should be prepared to go further and set an example to our EU partners.

7. We consider it highly undesirable that Parliament should have no say in regard to future changes to the 32 categories of offence listed in the framework decision. We therefore recommend that the list of offences be imported directly into the Bill. Clause 65(3) should be amended to refer, not as at present to the list of conduct set out in article 2.2 of the European framework decision but rather to the list of conduct set out in a specified schedule to the Bill (paragraph 55).

8. We further recommend that the Bill should delegate a power to amend this list only in so far as is necessary to reflect any extensions or amendments made to Article 2.2 of the framework decision by the EU Justice and Home Affairs Council (paragraph 56).

9. The Bill should also provide that any statutory instrument made under this delegated power should be subject to the affirmative resolution procedure (paragraph 56).

The 32 generic offence categories are set out in Article 2.2 of the framework decision on the European arrest warrant. Clause 63 of the Bill, which defines an “extradition offence”, refers specifically to the list in Article 2.2 of the framework decision.

Article 2.3 of the framework decision allows for the list to be amended. This can only happen with the unanimous agreement of all Member States.

The Government does not know of any plans to amend the list but we believe that we must retain the flexibility to deal with any such changes.

10. We agree with the European Scrutiny Committee that the European arrest warrant should be able to be issued only by a judicial authority exercising recognisably judicial functions in an independent manner. We consider that this requirement should apply to all Part 1 warrants. We therefore recommend that Clause 2(5) be amended to provide that the UK judicial authority may not issue a

Clause 2 certificate unless it believes that the Part 1 warrant was issued by such a judicial authority (paragraph 63).

As was explained in Committee, the Government believes that the fears which have been expressed are misplaced. The framework decision makes it quite clear that an EAW can only be issued by a judicial authority and we expect the same people who currently make extradition requests to us to do so in future.

Nevertheless, we recognise that there is very real concern about this point and we therefore intend to bring forward amendments to make it clear that requests can only be issued by a judicial authority.

However, we will also create a power to disapply the requirement in respect of requests from certain countries which have been issued before 1 January 2004 (when the EAW regime comes into effect). This is a transitional measure to enable the UK to deal with requests already on the Schengen Information System (SIS) at the point in 2004 when the UK becomes a party to that system.

Requests on the SIS require there to be a pre-existing judicially issued domestic arrest warrant and normally require the judge's permission to be placed on the SIS. However, there may be occasions in some countries when the information is put on the SIS at the instigation of police officers. In such circumstances the person whose extradition is sought may seek to delay proceedings by claiming that such requests have not come from a judicial authority and we want to be able to pre-empt such arguments. This problem will not arise once countries begin operating the EAW so this will be a limited short-term measure.

11. We recommend that Part 1 of the Bill be amended to specify that information that must be provided on the face of a Part 1 warrant, including a European arrest warrant (paragraph 68).

During Committee Stage the Government brought forward amendments to clause 2 of the Bill which have given effect to this recommendation.

12. We strongly urge the Government to re-consider its intention to give notification, under Article 27.1 of the framework decision, that it may be presumed to have consented to another EU member state taking proceedings against a suspect, where the other member state has also given such a notification under article 27.1. We recommend that Clause 53 be deleted from the Bill (paragraph 75).

The Government accepts that there is legitimate concern about the UK taking the higher position as regards specialty protection. While the Government continues to think that our EU partners are to be trusted in this regard, we accept the Committee's recommendation and will bring forward appropriate amendments to the Bill.

13. We consider that the power delegated by Clause 83(6) is too broadly defined. As currently drafted, Clause 83(6) would allow any territory whatsoever to be designated as exempt from the prima facie case requirement (paragraph 82).

14. We recommend that the power delegated by Clause 83(6) should be specifically limited to a power to make Orders in Council to exempt from the prima facie case requirement only:

- those European states that are signatories to the European Convention on Extradition but that are not EU members

- **any other state with which the UK has a bilateral agreement which requires that state, in making an extradition request, to meet evidential requirements equivalent to those set out in the Convention (paragraph 82).**

The Government first consulted on proposals to reform our extradition system in March 2001 following a Home Office review. We suggested that it should be possible to bring some of our key partners into line with the evidential requirements placed on members of the European Convention on Extradition (ECE). ECE countries do not need to provide prima facie evidence when they seek a person's extradition. The proposal was supported by three-quarters of respondents.

It cannot be right to ask our closest and most trusted international partners—countries such as Australia and Canada—to meet a higher evidential standard than we require from non-EU signatories to the ECE.

The Bill therefore allows for the prima facie evidential requirement to be removed, by Order, from Category 2 countries. We intend that, as now non-EU signatories to the ECE should not be required to provide prima facie evidence. In addition we intend to remove that requirement for a small number of Commonwealth and bilateral treaty partners.

However, the Government is keen to reassure the Committee that we do not intend to use this power widely. It will be reserved for our closest partners: countries with well-established democracies and robust and respected criminal judicial systems.

The Government understands the motives behind the Committee's recommendation 14 but cannot accept it. This is because it would prevent us removing the prima facie requirement from countries like Australia and Canada because our extradition relations with them are governed by the multi-lateral Commonwealth Scheme, rather than a bilateral treaty.

- **We recommend that Clause 83(3) be deleted from the Bill, so that a summary of a statement will not be admissible evidence for the purposes of Clause 83(2) (paragraph 86).**

Clause 83 deals with the evidence that is admissible in Part 2 cases. Subsection (3) allows statements, and summaries of such statements, made to investigating officers to be treated as evidence of fact. This has been included so, for example, a foreign police officer's account of what a witness told him would be admissible rather than requiring the witness to come to the UK to give evidence in person.

The Government believes that this is a sensible step, not least because such evidence will often be uncontested. The bill will not oblige the person whose extradition is sought to give evidence in summary nor will it prevent the person from challenging evidence given in summary form on behalf of the requesting state.

Nevertheless we appreciate the concerns of the Committee. We therefore intend to bring forward amendments to the Bill to give the judge greater discretion not to accept such evidence. This will allow the judge to accept such evidence when its provenance or credibility is not in doubt but will allow him the freedom to require evidence be given in person in other scenarios.

- **We are concerned that Clause 134(3) appears to undermine the rigorous evidential standards that we consider should be required to establish the existence of a prima facie case. We draw Clause 134 to the attention of the House (paragraph 87).**

Clause 134 is a technical clause which largely replicates section 26 of the Extradition Act 1989. It provides that duly authenticated documents issued in Part 2 countries can be received in evidence in UK extradition proceedings. It also sets out how a document may achieve the status of being duly authenticated.

The purpose of Subsection (3) is to allow the judge to admit material that has not been duly authenticated. He will not be compelled to accept this material but we believe that it should be possible for him to exercise discretion and decide whether to accept or give weight to such documents.

(There are no recommendations numbered 15–18 in the Committee’s report)

19. We consider that there is no justification for extending Part 1 of the Bill to include countries that maintain the death penalty (paragraph 92).

20. We recommend that clause 1(1) be amended to specify that any country which provides for the death penalty as a form of punishment is prohibited from being designated a territory for the purposes of Part 1 of the Bill. If this is done, then Clause 15 [death penalty as a bar to extradition] can be deleted from the Bill as otiose (paragraph 92).

The Committee raises an important point of principle. While the Government has made it clear that it is highly unlikely that a country that maintained the death penalty would ever be allowed to join Part 1 we accept that the existence of this provision leaves sufficient room for legitimate concerns to be raised. Nor does the Government want to do anything that could be construed as a retreat from its opposition to the death penalty. We therefore accept the Committee’s recommendation and will be bringing forward appropriate amendments to the Bill.

21. We recommend that Clause 15 be amended to require that, if the judge receives a written assurance that a death sentence will not be imposed or carried out, then the judge must send the assurance to the Secretary of State for him to determine whether the assurance can be considered adequate (paragraph 96).

22. We endorse the comments of the Joint Committee on Human Rights on the adequacy of written assurances that the death sentence will either not be imposed or, if imposed, will not be carried out. We urge the Government to give an indication of how it proposes that the adequacy of a written assurance that a death sentence will not be imposed or carried out should be assessed (paragraph 99).

Since the Government plans to remove the possibility of a country that retains the death penalty joining Category 1 the Extradition Bill makes no change to existing practice regarding cases where the death penalty may be an issue. This has served us well and has not caused any problems.

Any assurances received on the death penalty have to come from someone who has the power to ensure that the assurances are upheld. The Secretary of State has judged the adequacy of these in the past and will continue to do so under the Bill.

23. We consider that Clauses 3(3) and 5(2) should explicitly limit the scope of the Secretary of State’s delegated power by defining who may constitute an “appropriate person”. Clearly, officers of HM Customs and Excise could be so specified; the House should consider whether there are any other categories of officer whom it may be appropriate to specify (paragraph 104).

This is an area where the Government's intentions appear to have been misunderstood. It has never been the Government's intention to allow foreign police officers the power of arrest in the UK under the EAW. However, we accept that there is a desire to put this matter beyond all doubt. The Government is therefore going to amend the Bill to specify who constitutes an appropriate person.

24. We recommend that Clauses 4(2) and 71(2) be amended. We consider that, if it is not possible for the arresting officer to be in possession of the warrant at the time of the arrest, then the officer (or some other appropriate officer) should be *required* to show the warrant to the arrested person as soon as practicable after the arrest. We can see no justification for placing the onus on the arrested person to ask to see the warrant, rather than on the appropriate law enforcement officials (paragraph 106).

25. We recommend that the Bill be amended to require the judge before whom the arrested person is initially brought to inform the person of the European arrest warrant and of its contents (paragraph 109).

In the vast majority of cases the Government would expect the warrant to be shown to the person at the time of his arrest or shortly thereafter. However, when this does not happen the Government does not believe that there should be a requirement for the police to show the person the warrant in the absence of a request from the person or his legal adviser.

There is no corresponding requirement in domestic law for the arrested person to be shown the warrant if he has not been shown it at the time of his arrest, unless he requests to see it, and this has not caused difficulties. So far as is possible procedure in extradition cases should be kept in line with that for domestic cases.

Anyone who is arrested in an extradition case is entitled to legal aid and it is likely that one of the first things that the person's legal adviser will do is to ask to see the arrest warrant if it has not already been produced to the person.

A proportion of those arrested in extradition cases may not speak English or be familiar with the UK's legal and judicial processes. It therefore seems much more sensible for the warrant to be made available at a time of the person's legal adviser's choosing rather than at a time of the police's choosing.

It is clear from the Bill that the extradition hearing could not take place without the relevant judge having seen the contents of the warrant. In deciding the questions which are for resolution at the initial hearing, and in giving the person the required information about consent, the district judge will inevitably have to convey to the person, or to his legal representative, the contents of the warrant.

However, to be certain of this, considering the comments made by the Committee, we intend to bring forward amendments to place a positive duty on the judge to check that the person has seen the warrant or a copy of it. This will be in all cases, not just when it was not possible to show the person the warrant at the time of his arrest. Since the initial hearing must take place within 48 hours of someone being provisionally arrested the Government hopes that the Committee will accept that this is a sensible way of meeting their concerns.

26. We consider that the requirement of article 11.1 of the framework decision, that an arrested person must be informed of the possibility of consenting to surrender to the issuing judicial authority, would appear to be satisfied if the judge is required to give only that information specified in paragraphs (a) and (c) of Clause 8(3) and paragraphs (a) and (c) of Clause 71(7). We recommend that the Bill is amended accordingly (paragraph 112).

Technically the Committee is correct that to comply with Article 11.1 of the framework decision only paragraphs (a) and (c) of the relevant clauses in the Extradition Bill are needed.

However, the Government believes that as giving consent to extradition is such a significant step the judge should also be under a duty to explain its implications, most notably the effect on the person's rights to specialty protection once returned, and the procedures that will follow consent.

27. We recommend that where an arrested person consents to be extradited, the judge or, in some Part 2 cases, the Secretary of State, should be required to satisfy him or herself that

- **the arrested person has been offered access to free legal advice before giving consent to be extradited;**
- **access to such legal advice was made available to the person, and**
- **the person has understood the implications of giving consent to extradition (paragraph 114).**

We are persuaded by the argument of the Committee and those that raised the same point during Committee Stage. It is our intention therefore to place a duty on the district judges to satisfy themselves that a person who consents to extradition has had access to legal advice.

28. We recommend that Clause 202 should be deleted and that the repeal of the 1989 and 1965 Acts should be provided for on the face of the Bill itself. We do not consider that such a provision repealing the 1989 and 1965 Acts would be incompatible with the needs for these Acts to continue to apply to any extradition requests made prior to the Bill coming into force. We consider that appropriate provisions can be drafted for this eventuality without needing to delegate to the Government the power to repeal the Acts (paragraph 116).

We are grateful for the Committee's suggestion in this regard. It is now the Government's intention to provide for the repeal of existing legislation on the face of the Extradition Bill.

29. We recommend that central statistics on extradition to and from the Republic of Ireland should henceforth be maintained (paragraph 8).

In future the Republic of Ireland will be treated in the same way as all other EU countries and will be subject to the same record-keeping regime and once they implement the European arrest warrant records for extradition to the Republic of Ireland will be identifiable.

*Bob Ainsworth MP
Parliamentary Under Secretary of State for Anti-drugs Co-ordination and Organised
Crime
Home Office
February 2003*

UK OFFENCES LIST: 1-3 YEARSBail Act 1976

Section 6—failing to surrender—12 months

Children and Young Person Act 1933

Section 26—procuring child to go abroad by false representation—2 years.

Contempt of Court Act 1981

Section 14—contempt of superior court—2 years

Copyright Designs and Patents Act 1988

Section 107—making, infringing copy—2 years

Crime and Disorder Act 1998

Section 29(1)(c)—racially aggravated common assault—2 years

Section 31(1)(a)—racially aggravated causing fear of violence—2 years

Section 31(1)(a)—racially aggravated intentional harassment—2 years

Section 31(1)(a)—racially aggravated harassment—2 years

Criminal Justice Act 1925

Section 36(1)—making false statement to procure passport—2 years

Criminal Justice Act 1988

Section 139—possessing sharp bladed or pointed instrument—2 years

Criminal Law Act 1977

Section 54—incitement to incest—2 years

Customs and Excise Management Act 1979

Section 16—obstructing officer, etc—2 years

Forgery and Counterfeiting Act 1981

Section 5(4)—making machine, etc., no intent—2 years

Penalty provision: section 6

Incitement to Disaffection Act 1934

Section 1—seducing member of forces from duty—2 years

Section 2—possessing document, etc—2 years

Penalty provision: section 3

Indecent Displays (Control) Act 1981

Section 1—displaying indecent matter—2 years
 Penalty provision: section 4

Knives Act 1997

Section 1—marketing combat knife—2 years
 Section 2—publishing material—2 years

Mental Health Act 1983

Section 126—possession of false document—2 years
 Section 127—ill treating patient—2 years
 Section 128—assisting absconded patient—2 years

Merchant Shipping Act 1995

Section 58—endangering ship—2 years

Misuse of Drugs Act 1971

Section 5(2)—possessing Class C drug—2 years
 Section 11(2)—contravention of directions—2 years
 Section 17(4)—giving false information—2 years
 Section 18—contravention of regulations, etc—2 years
 Section 23—obstructing search—2 years
 Penalty provision: Schedule 4

Offences against the Person Act 1861

Section 34—endangering rail passenger by neglect—2 years
 Section 36—obstructing minister of religion—2 years
 Section 38—assault with intent to resist arrest—2 years
 Section 60—concealment of birth—2 years

Official Secrets Act 1920

Section 1(1)—gaining admission to prohibited place—2 years
 Section 1(2)—retaining document, etc—2 years
 Section 3—interfering with police officer or sentry—2 years
 Penalty provision: section 8(2)

Official Secrets Act 1989

Section 1—disclosing information—2 years
 Section 3—Crown servant making disclosure—2 years
 Section 4—unauthorised disclosure—2 years
 Section 5—unauthorised disclosure by recipient—2 years
 Section 6—unauthorised disclosure—2 years
 Penalty provision: section 10

Perjury Act 1911

Section 1A—false statement for foreign proceedings—2 years

Post Office Act 1953

- Section 11—sending prohibited matter by post—12 months
- Section 55—retaining postal packet—2 years
- Section 58—opening postal packet—2 years
- Section 68—soliciting offence—2 years

Protection from Eviction Act 1977

- Section 1—depriving residential occupier of occupation—2 years

Public Order Act 1936

- Section 2—unlawful organisation—2 years
- Penalty provision: section 7

Representation of the People Act 1983

- Section 60—personation—2 years

Road Traffic Act 1988

- Section 2—dangerous driving—2 years

Sexual Offences Act 1956

- Section 2—procurement of woman by threats—2 years
- Section 3—procurement by false pretences—2 years
- Section 4—administering drugs—2 years
- Section 6—unlawful sexual intercourse with girl under 16—2 years
- Section 7—intercourse with defective—2 years
- Section 9—procurement of defective—2 years
- Section 10—attempted incest by man—2 years
- Section 11—attempted incest by woman—2 years
- Section 12—other forms of buggery—2 years
- Section 13—indecent by males—2 years
- Section 19—abduction of girl under 18—2 years
- Section 20—abduction of girl under 16—2 years
- Section 21—abduction of defective—2 years
- Section 22—causing prostitution—2 years
- Section 23—procuring girl under 21—2 years
- Section 24—detention in brothel—2 years
- Section 26—permitting premises to be used—2 years
- Section 27—permitting defective to use premises—2 years
- Section 28—causing prostitution of girl under 16—2 years
- Section 29—causing prostitution of defective—2 years
- Section 32—man soliciting—2 years

Theft Act 1968

- Section 12A—aggravated vehicle taking not resulting in death—2 years

Theft Act 1978

- Section 3—making off without payment—2 years
- Penalty provisions: section 4

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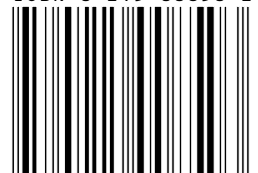
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