

# **CHRISTMAS DAY AND NEW YEAR'S DAY TRADING (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Christmas Day and New Year's Day Trading (Scotland) Bill introduced in the Scottish Parliament on 20 March 2006. It has been prepared by Karen Whitefield MSP, the member in charge of the Bill, with assistance from the Parliament's Non-Executive Bills Unit, to satisfy Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 59-EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The objective of the Bill is to prohibit large retail shops from opening in order to engage in retail trading on Christmas day and New Year's day. This is in response to what is considered could become a trend of larger shops trading on these days.

3. A "large" shop is defined in the Bill as having a relevant floor area exceeding 280 square metres (or 3000 square feet). This definition was included in the Sunday Trading Act 1994 (although this statute does not apply in Scotland), it having been considered that shops of this magnitude generally require to be staffed by employees.

4. The intention is to maintain the special nature of Christmas day and New Year's day, traditionally these being the two holidays in the calendar when most people would expect to be able to spend time with families and friends rather than at work. It is the Member's view that this special nature would be undermined by large shops trading on these days.

5. Christmas day and New Year's day are bank holidays in Scotland but more than that they are the two dates in the year considered by most people to be "national" or "public" holidays. By safeguarding the uniqueness of these days it is also the intention of the Member to make a positive if modest contribution to the nation's work-life balance.

6. The Member's policy is that large shops should be closed on Christmas day and New Year's day, irrespective of on which day of the week these dates fall.

## **BACKGROUND**

### **Public Holidays**

7. Christmas day and New Year's day are widely observed as public or national holidays throughout the UK. There is no legal definition of public or national holiday on either side of the border, however, the term tending to be used synonymously with that of a bank holiday.

8. Legislative provision for bank holidays originates from the 1871 Bank Holidays Act, which designated named days on which banking transactions could be suspended to the following day without incurring a penalty. The provisions of the 1871 Act were eventually repealed and incorporated into the Banking and Financial Dealings Act 1971, which remains the statutory basis for bank holidays in Scotland today.

9. It is worth noting that in spite of the statutory basis, the bank holiday legislation does not actually require banks, or any other organisation, to close on these days, nor does it provide a statutory obligation to grant the holiday or any right to extra pay or time off in lieu for staff who work on these days. All of these issues are subject to contractual agreement between employers and employees.

10. Yet bank holidays have become so widely observed in the UK that terms and conditions of employment commonly include entitlement to a holiday on those days. History, culture and tradition have conferred both days with far greater significance than can be said of other bank holidays.

11. Looking at the two days in question, New Year's day has a longer history as a holiday in Scotland dating back to the 1871 Act but it was only made a Bank Holiday for England and Wales as recently as 1973. Christmas day, on the other hand, has enjoyed more of a tradition south of the border having been a long-standing holiday in England, Wales and Northern Ireland.

### **Special nature of both Christmas day and New Year's day**

12. In religious terms the significance of 25 December as Christmas day dates back to the 4<sup>th</sup> Century when it was fixed in Rome as the date of the feast of the nativity. It is an occasion that has developed and tapped into not only Christian traditions but also Pagan, Hebrew, Greek and Nordic elements.

13. In the 17<sup>th</sup> Century there were efforts by the Puritans to clamp down on Christmas celebration, and it is often claimed that Cromwell himself sought to abolish Christmas. In the Victorian era, in contrast, Christmas was very much embraced and enhanced with elements such as the Christmas tree, carol singing and philanthropy. It is from this era that the modern concept of Christmas really came into being.

14. Although it appears to have been a celebratory holiday for the best part of a Millennium, the essential cultural meaning of Christmas is not easy to capture. It can perhaps best be conveyed in the words of several writers.

15. To quote Charles Dickens: *“I do come home at Christmas. We all do, or we all should. We all come home, or ought to come home, for a short holiday - the longer, the better - from the great boarding school where we are forever working at our arithmetical slates, to take, and give a rest.”* (A Christmas Tree, 1851)

16. Later in the 19<sup>th</sup> Century Rudyard Kipling similarly described the day as: *“a truce, then, to our labours — let us feast with friends and neighbours.”* (Christmas in India, 1886)

17. Many people will be familiar with the travails of George Bailey in Frank Capra’s 1946 film *It’s A Wonderful Life*, or the haunting and redemption of Charles Dickens’ character Ebenezer Scrooge in the 1843 novel *A Christmas Carol*. These shared cultural references perhaps embody a sense of what is understood to be special, unique, sentimental even, about the nature of Christmas day.

18. During the House of Lords’ consideration of the Christmas Day (Trading) Act 2004 (which applies only to England and Wales), one of the contributors, Lord Judd, colourfully stated: *“I want my grandchildren to grow up in a culture that has contrasts and rhythm, romance and magic. This modest little Bill is about all that.”*

19. Other views expressed during the passage of that legislation through both the Houses of Lords and Commons as to what makes Christmas day “special” included:

- its focus on children;
- an opportunity for gathering of family and friends;
- a unique day in the life of the nation;
- the highlight of our cultural calendar;
- time for a collective breather from the pace of modern life;
- a celebration of Christianity; and
- the promotion of such sentiments as goodwill and fellowship.

20. New Year’s day also has a special importance in the Scottish calendar. According to Walter Scott: *“Each age has deemed the new-born year. The fittest time for festal cheer.”* (*Marmion*, 1808)

21. Indeed, up until the 1950/1960s it is noted that New Year’s day was a more popular and widely adhered to holiday and celebratory occasion in Scotland than Christmas day. This cultural difference between north and south of the border, although less marked today, is reflected in the fact that Scotland enjoys not only New Year’s day as a bank holiday but the following day as well.

22. Hogmanay, the last day of the year, is synonymous with celebrating New Year in a traditional Scottish manner. Its roots go back not only to a Pagan celebration of the winter solstice but also to Roman and Viking influences.

23. There are a number of particularly Scottish customs linked to Hogmanay/New Year's day including first footing and fireball swinging (a north eastern custom), and no celebration is complete without a rendition of Burns' *Auld Lang Syne*. The words to the latter were first published in 1796 and it is now sung across the globe at New Year giving rise to a not unreasonable claim to being the World's Unofficial National Anthem.

### **Other relevant legislation**

24. In Scotland there has been no statutory regulation of shop trading hours, with Sundays having no special status.

25. A voluntary agreement that Scottish employers would follow the provisions of Part IV of the Employment Rights Act 1996 (relating to the protection of shop and betting workers – part IV not then applying to Scotland) appeared to have been broken by Argos in 2002 when it dismissed some workers who refused to work on a Sunday.

26. As a result, pressure mounted for a change in the law to give Scottish workers the same legal protection as their counterparts in England and Wales, and the Sunday Working (Scotland) Act 2003 served to extend Part IV of the Employment Rights Act 1996 to Scotland.

27. That 2003 Act, which was a reserved employment measure enacted by the UK Parliament, commenced on 6 April 2004. This gives employees the right to refuse to work on a Sunday, provided they give their employers 3 months written notice. This applies to Christmas day when it falls on a Sunday.

28. In the rest of the UK there has been a degree of regulation of shop trading since the Sunday Trading Act 1994. The 1994 Act imposed restrictions on Sunday opening by large shops by limiting the hours in which they could trade (6 hours between 10am and 6pm). This includes closure on both Easter Sunday and Christmas day when it falls on a Sunday.

29. Also at Westminster the Christmas Day (Trading) Act 2004 was introduced as a Private Member's Bill by Kevan Jones MP in January 2004. It extends only to England and Wales and prohibits the opening of large shops on Christmas day, no matter on which day this falls. The definition of large shops derives from the Sunday Trading Act 1994.

30. The 2004 Act was seen as addressing an anomaly in the Sunday Trading Act 1994 in that trading by large shops on Christmas day was prohibited but only when the 25<sup>th</sup> fell on a Sunday.

31. It was passed following two previous and unsuccessful private members' bills on the matter, one introduced by Gwyneth Dunwoody MP in 2001, the other by Lord Davies of Coity in 2002 (introduced in the House of Lords and taken on in the Commons by Kevin Hughes MP).

### **EC Working Time Regulations**

32. Neither the EC Working Time Directive 93/104/EC nor the Working Time Regulations S.I. 1998/1833 made to implement it, cover bank and public holidays. Legally the right to take a

bank or public holiday continues to be a matter for agreement between employers and their employees.

## **WHY REGULATE TRADING ON CHRISTMAS DAY AND NEW YEAR'S DAY?**

### **Concerns, trends, effects**

33. The policy behind the Bill originates from the *Protect Christmas Day and New Year's Day in Scotland Campaign* run by the Union of Shop, Distributive and Allied Workers (USDAW).

34. This campaign had arisen from a trend in recent years of a number of retail organisations beginning to experiment with Christmas day and New Year's day trading, and the fear that staff might be required to work on these days.

35. The union's view was that many of its members were already working longer hours over the Christmas period, usually for no extra money (in terms of premium/overtime payments), with many shops being open late on Christmas eve, on Boxing day and throughout the New Year period. It wished to ensure that its members were protected from this further extension in working hours, suggesting such practices ran counter to a policy of family-friendly employment.

36. A survey for the Work Foundation in 2003, for example, found that 37% of men perform unscheduled work over the Christmas period and 24% claimed that work caused them to neglect their children in some form, for example 21% missing their child's school Christmas play.

37. Until now it has been convention that has prevented large shops from opening on Christmas day and New Year's day. It is the member's view that such an approach is no longer tenable given a recent, and what is feared could become a growing, trend of seasonal opening. The overwhelming majority of retailers do not open on either day but in recent years a handful of companies north and south of the border have experimented with trade on these days. The highest profile example in Scotland is Debenhams who for the first time opened on 1<sup>st</sup> January in 2004.

38. It is estimated by the Labour Force Survey that 252,000 people in Scotland work in shops, amounting to 1 in 10 of the workforce. However it is not only on shop workers and their families that Christmas day and New Year's day trading will have an impact. Widespread opening of large shops on these days could have a significant knock on effect for workers in other connected services – banking and call centre staff, street cleaners, traffic wardens, delivery drivers, transport workers, emergency service and hospital workers etc.

### **What is being regulated?**

39. The Bill provides for the prohibition of opening by large shops on Christmas day and New Year's day in order to engage in the business of retail sales.

40. "Large" in this context is set out in paragraph 3 of this document.

41. “Retail sale” is defined in the Bill as meaning: “*any sale of goods for consumption or use, whether or not by the buyer, for purposes unconnected with a trade or business.*” (Section 6)

### **Enforcement, liability, defences**

42. The Bill does not adhere to the local authority inspectorate model for England and Wales as set up by Sunday Trading Act 1994 and followed by the Christmas Day (Trading) Act 2004. That Sunday Trading precedent does not exist in Scotland, and it was felt that the appointment of inspectors might add an unnecessary layer of local authority bureaucracy plus bringing costs that would have had to be borne by councils. Instead the provision for enforcement comes under the auspices of the criminal law i.e. it will fall to the police to take action if a large shop breaks the prohibition and chooses to open for the purpose of retail trading on Christmas day or New Year’s day.

43. Successful prosecution will result in a fine of up to £50,000, the same maximum penalty as exists under the legislation for England and Wales. This could be seen as a relatively small amount given the turnover of some large shops especially during the festive period. However it is considered that negative publicity emanating from a prosecution plus a possible erosion of public good will for the business in question may form as much of a deterrent as the level of financial penalty.

44. In respect of liability then the offence can apply to both individuals and/or corporations in order that all those who may control the opening of large shops can be found liable.

45. The only defence is one of due diligence meaning that the accused or those working for or representing the accused must have shown they had taken all reasonable precautions in order to avoid committing the offence. This would have to be something tangible and positive, for example have trained staff in their responsibilities.

### **What shops are not affected by the Bill?**

46. The Bill does not apply to shops smaller in size than 280 square metres, which in comparative terms is a bit smaller than a municipal swimming pool (say of 25 metres in length) or a touch bigger than a tennis court.

47. Thus the majority of convenience stores, corner shops, small grocers, small local shops basically, will not be prevented from opening for business on Christmas day and New Year’s day.

48. The rationale for the size aspect of the Member’s policy is informed by the following factors:

- It is regarded as being the largest sized store that could be staffed by one person and therefore offers an exemption to sole traders;

- A shop with a sales area of less than 280 square metres will attract fewer customers than a larger store, bringing less traffic and creating less disruption to local communities on Christmas day and New Year's day;
- Such a shop will require fewer stock deliveries and smaller delivery vehicles, again causing less disruption;
- There is a precedent in that the retail industry in England and Wales has worked with the 280 square metres definition for more than a decade now, understanding the definition and its impact on their conduct their business;
- Defining small shops by the size of their sales and display area ensures that the regulation can be easily policed.

49. That these smaller scale businesses are not being prevented from opening for business also means from a customer viewpoint that "last minute" or emergency purchases on Christmas day and New Year's day are still possible – bread, milk, tea, coffee, sugar etc.

50. In addition to those shops beneath the size criteria, there are specific provisions set out in section 2 of the Bill, which would exempt the following types of premises from its provisions:

- Restaurants, pubs and take-away eateries;
- Registered pharmacies (for the purpose of administering prescriptions);
- Shops within commercial airports, railway stations, ports, and at motorway service stations; and
- Filling stations (for the purpose of selling fuel and other goods).

51. The thinking behind these exemptions is that the relevant businesses either provide an essential public service (pharmacies), satisfy a public demand for hospitality (restaurants, pubs, take-aways), or else they facilitate a means of travel (shops at airports, railways, ports, motorway services, filling stations).

52. Focusing on the family nature of Christmas day and New Year's day links to this recognition of the needs of people in transit whether to get home or visit friends and family by whatever means of transport.

### **Support for legislation**

53. A petition against Christmas day opening, boasting 20,000 names, was presented to Downing Street in 2000. Three years later Kevan Jones MP presented a further petition to Number 10 boasting more than 250,000 signatures.

54. In April 2003 the DTI issued a consultation paper titled *Christmas Day Trading – a consultation on a proposal to regulate the opening of large shops (internal floor area of over 280 square metres or 3,000 square feet) on Christmas Day*.

55. In that paper it was stated: *“The Government believes it is necessary to act now to avoid a gradual process of opening by large stores, for example as a result of perceived competitive pressure. It also believes that legislation is the only way to ensure that large stores will remain closed on Christmas Day in the future.”*

56. The analysis of responses to that DTI consultation on Christmas day trading showed that 97% of all responses supported keeping Christmas day “special” and agreed that larger shops should remain closed.

57. The DTI consultation produced the following six recurrent views:

- Christmas day is an important time for families whatever their religious persuasion;
- Costs to large shops are likely outweighing potential profits;
- Opening of large shops increases the need for other services such as those of wholesale, clerical, manufacturing, and transport;
- Large shops opening places staff under pressure to provide adequate cover;
- Competitive pressure is such that opening of some large shops would cause others to follow; and
- Convenience stores are open if there is need for a last minute or emergency purchase.

58. At the same time as the DTI consultation, USDAW stated that 94% of their members who responded to their own survey considered that at some point in the future they would be forced to work on Christmas day.

59. In January 2004 a petition organised by USDAW north of the border attracted 14,000 signatures supporting legislation to prevent large stores from opening on both days. This was presented to the Scottish Parliament’s Petitions Committee who agreed by majority to pass the petition to the Member in charge of the Bill as part of her consultation.

60. The Member’s own consultation resulted in overwhelming support – 89% – for legislation. See paragraphs 65 to 77.

### **Alternative approaches**

61. The introduction of a voluntary code by retailers where they would agree not to introduce opening on Christmas day, was a possible alternative to legislation. However, it was clear from the majority of respondents to the Member’s consultation that they did not favour this approach, considering that retailers might not abide by such a code.

62. The Scottish Retail Consortium’s stated position has been that there is no demand for opening on Christmas day but that it wishes to see if a voluntary code to protect staff with no desire to work on New Year’s day would work. The SRC’s members have agreed that if their stores were to open on New Year’s day in the future, they would sign an agreement to ensure staff are not obliged to work on that day.

63. There is potentially an issue of legality for any code that might be drawn up and agreed between retailers. Indeed at U.K. level following discussions between the Office of Fair Trading and the Department of Trade and Industry it was concluded that to try and adopt such an approach would be seen as an encouragement to breach Chapter 1 of the Competition Act 1998. The issue was that the creation of such a cartel could be seen as being anti-competitive.

64. Another approach could have been one of take no action and rely on convention to restrict further opening by large shops on Christmas day and New Year's day. However given the concerns expressed by shop workers, the experience of a minority of companies testing the market, as well as a fear that a domino effect could occur, plus last year's enactment of a prohibition in England and Wales, the Member considers that legislation offers the best option.

## **CONSULTATION**

65. The Member carried out an extensive consultation exercise between November 2004 and February 2005. Over 170 copies of the consultation paper were sent in hard copy to various groups and individuals, including retail organisations, trade unions, consumers, religious groups and retailers.

66. The consultation paper was available on the member's website and a press statement was also issued to the national media regarding the proposal.

67. The main areas of consultation were:

- the principle of maintaining the special nature of Christmas day and New Year's day;
- whether large shops should be prohibited by law from opening on both days to protect the special nature of those days for staff;
- the benefits of prohibiting large shops from opening versus any disadvantages;
- the definition of a large shop;
- equality or religious issues arising from the proposal;
- possible financial implications of the proposal; and
- the appropriateness of enforcement under the criminal law and nature of penalties that should apply.

68. There were 91 responses to the consultation with the overwhelming majority of respondents – 89% – expressing support. Only 4.4% were against the proposal; 3.3% took no position on Christmas day but opposed the proposal to prohibit trading on New Year's day; and 3.3% supported the proposals for Christmas day but opposed the proposal for New Year's day.

69. Responses came from a range of organisations and individuals including retailers both large and small, trade unions, private individuals, MSPs and faith organisations.

70. The main themes that came out from the responses were:

- the importance of both these days to families;

- the clarity that legislation would give to both employers and employees;
- the cost of opening shops would be likely to outweigh any potential profits; and
- these two holidays provided an opportunity to give retail staff a break at such a busy time of year for them.

71. It was also argued that with the availability of 24/7 shopping, closing large stores on these two days would enhance their special nature.

72. Smaller retailers in Scotland who responded supported the prohibition of trading by large shops on both Christmas day and New Year's day.

73. Larger retailers in Scotland remained neutral about closing shops on Christmas day but were opposed to closure on New Year's day as their view was that the traditional nature of that day creates opportunities for trading.

74. The Scottish Retail Consortium (SRC), which represents many retail employers, has already indicated in their own press release of 10 December 2003 that they support the proposal for Christmas day, but are opposed to the proposal for New Year's day. They cite tourist shoppers on January 1<sup>st</sup> as the reason for their opposition.

75. The minority of respondents who did not favour proposals for the prohibition of trading on New Year's day cited the impact that the closure of stores might have on the tourist trade at that time of year, and on Scotland's image when the country is a focus of international attention. They also argued that there was both customer demand for stores opening and employee demand to be able to work on New Year's day.

76. It is the Member's view that tourism would not be detrimentally affected by closure of large shops on New Year's day given the following factors:

- The reality is that hardly any large shops are open on 1<sup>st</sup> January at present;
- The influx of tourists to Scotland at New Year for Edinburgh's Hogmanay celebrations, for example, is most influenced surely by the scale and quality of the capital's celebrations and the nation's reputation for hospitality (not to mention knowing how to throw a good party);
- But if visitors do wish to spend their time here shopping then of course they will have plenty of opportunities given the frenetic sales activity of almost all large shops at this time of year – one non-shopping day over the New Year period is hardly going to dampen their enthusiasm either for the charms of Scotland or for engaging in out-and-out retail therapy;
- Basic economics and also the experience of retailers suggests that creating an extra day's trading will not necessarily produce more revenue, rather it is more likely to result in the spread of existing consumer spending over the entire seasonal period; and

- Feedback from members of USDAW strongly suggests the prevailing view of shop workers is quite the opposite to the claim that employees want to work on New Year's day. An indication of the level of disquiet on the matter is suggested by the feedback from two thirds of the respondents to a consultation conducted by the union answering "yes" to: *do you think that without a change in the law you would be forced to work on Christmas Day and New Year's Day?*

77. In parallel to the Member's consultation document, USDAW published a petition which received 3675 signatories supporting legislation to prevent large shops opening on Christmas day and New Year's day; and also initiated a postcard campaign where 1382 postcards were received in support of the member's proposal.

### **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

78. The policy underpinning the Bill is directed at safeguarding the special nature of Christmas day and New Year's day not only for shop workers and their families but for society as a whole. By restricting large scale retail on the two most widely observed public holidays in the year, the policy may also make a small but positive difference for Scotland's work-life balance.

79. It does not discriminate against any particular group of groups of people although more women than men will be affected due to the gender ratio of shop workers. However, in terms of positive effect, the Bill aspires to enhance the quality of life of all rather than on any one group or groups in particular. The policy is intended to benefit everyone irrespective of their gender, faith or social grouping.

80. The Bill affects everyone who currently owns, manages, works for, or shops in, large shops, yet most people are already on holiday on both of those days and most large shops are already closed. In this context the Bill reinforces current practice and makes a proportionate rather than a significant change. Small retailers are unaffected and appropriate exceptions are provided. Furthermore, only retail sales are affected. There is nothing to prevent large shop owners or managers from operating in respect of other aspects of business such as shelf-stacking, deliveries, stocktaking etc.

81. In gender terms the majority of retail workers are women – approximately 68% according to the *Women & Men In The Workforce* report produced by the UK government's Women & Equality Unit (January 2005). Given the pivotal role women play in family life in general and child care in particular then the Bill can be seen as a positive development for family-friendly policy and work-life balance.

82. In terms of religious issues arising from a Bill, in their response to the Member's consultation, the Scottish Trades Union Congress pointed out that "*recognition of the full religious diversity of religious belief is a vital component in modern employment practice. Under the 2003 Regulations to comply with the EC Directive on Religious Discrimination in the workplace, employers may find that they indirectly discriminate against workers if they prevent*

*them from taking holidays during religious festivals without presenting a good business case for this.”*

83. In the run-up to Christmas 2003 the then Trade and Industry Secretary, Patricia Hewitt MP, said: “*We live in a multi-cultural, multi-faith society, but Christmas Day remains a special day for most UK citizens, either for religious or family reasons*” (as quoted in Usdaw press release, 22 December 2003).

84. It might be contended that in a multi-cultural society it is inappropriate to protect a Christian festival in the way the Member intends, and that such a prohibition might discriminate against people of non-Christian faiths whose own key religious festivals are not similarly protected.

85. However, it is not a controversial claim to suggest that Christmas day has lost much of its religious significance for a number of people and is probably now more widely seen more as a family day or celebrated for the various factors outlined in paragraph 19.

86. It is worth noting that in 2003 the Scottish Inter Faith Council took some informal soundings on the issue from faith group representatives, several of whom responded that they would be content or even welcome such a provision. There was no indication that they would expect similar closure of shops on their respective religious festivals.

87. The Bill may suggest some issues under the European Convention on Human Rights in relation to the peaceful enjoyment of possessions and control of one’s property. However it is considered that the control measures set out in the Bill constitute a legitimate aim in the public interest in an area in which the State has a wide margin of appreciation.

88. The issue of the rights of those who may wish to work on Christmas day and New Year’s day may arise. A balance here is intended between those who wish the right to work and the rights and freedoms of other persons not to work on these days so as to be able to exercise the right to enjoy family life.

89. It is additionally noted that what the Bill prohibits is the opening of large shops for the purpose of making retail sales. Other activities related to the business could still occur as stated in paragraph 81 above. Therefore the opportunity to work on these days may continue even with large shops not being able to serve customers.

90. The Bill does not affect rights under the European Convention on Human Rights and there is no distinction made by the Bill between island and rural communities and any other communities. Neither is there any effect on sustainable development.



*This document relates to the Christmas Day and New Year's Day Trading (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 20 March 2006*

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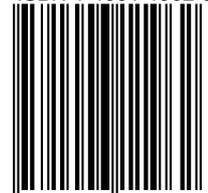
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